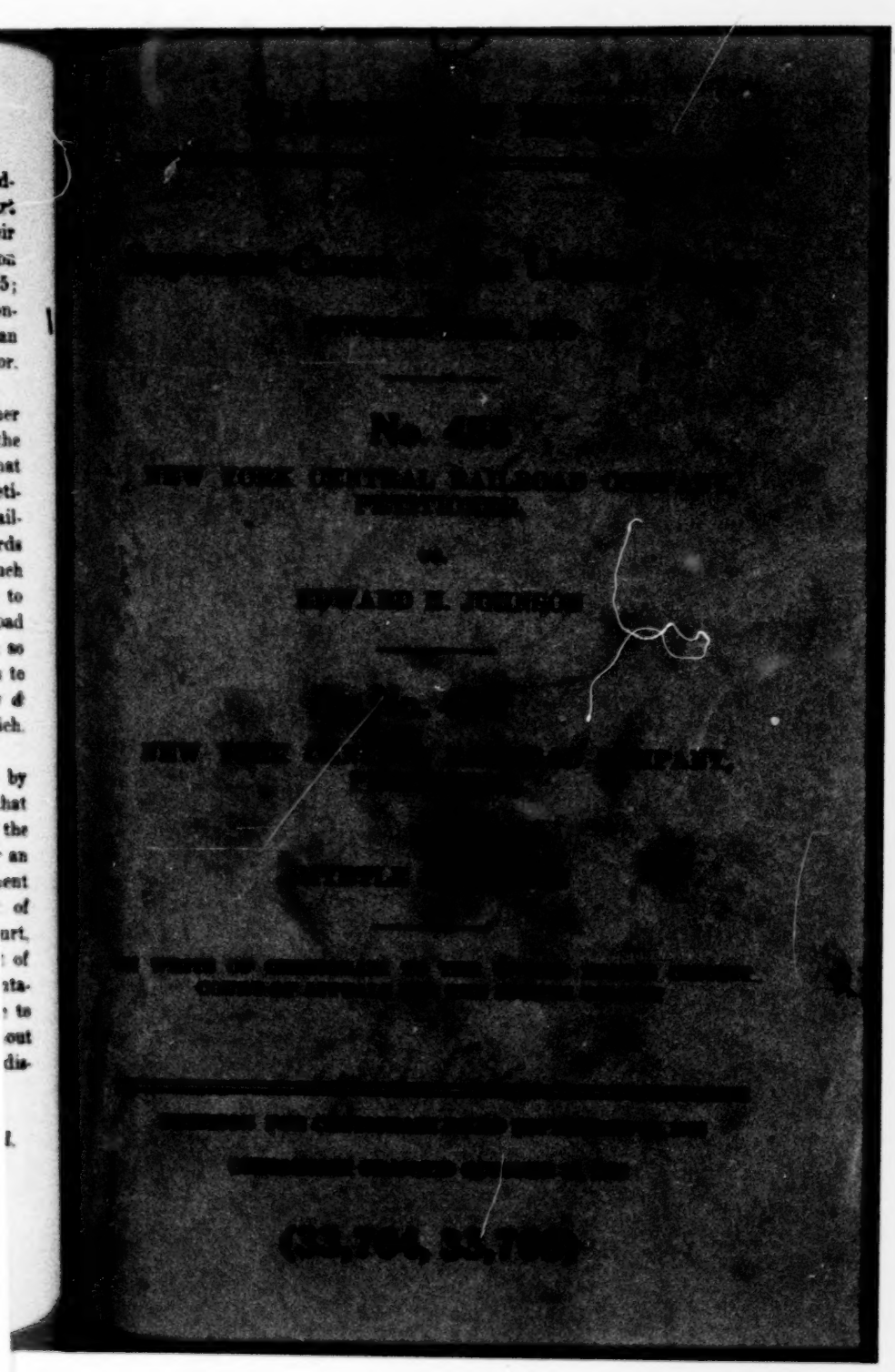

(33,764, 33,765)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 455

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

EDWARD H. JOHNSON

No. 456

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

vs.

MYRTLE J. JOHNSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, eighth circuit	a	1
Caption	(omitted in printing)	a	
Record from the district court of the United States, Western Missouri	1	1

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1928

	Original	Print
Citations and services ..... (omitted in printing) ..	1	
Writs of error and clerk's returns	2	1
Caption ..... (omitted in printing) ..	5	
Minute entries	6	4
Record from circuit court of Jackson County	6	5
Caption	6	5
Petition in cause No. 6250	6	5
Petition in cause No. 6300	9	8
Order of removal in cause No. 6250	11	10
Order of removal in cause No. 6300	11	11
Petition for removal in cause No. 6250	12	11
Petition for removal in cause No. 6300	14	13
Bond on removal in cause No. 6250 (omitted in printing)	16	
Bond on removal in cause No. 6300 (omitted in printing)	17	
Notice of filing of petition for removal, etc., in cause No. 6250	18	15
Notice of filing of petition for removal, etc., in cause No. 6300	19	16
Answer in cause No. 6250	20	16
Answer in cause No. 6300	20	17
Motion to dissolve attachment and discharge garnishees in cause No. 6250	21	18
Motion to dissolve attachment and discharge garnishees in cause No. 6300	22	19
Order dissolving attachment and discharging garnishees in cause No. 6250	25	20
Order dissolving attachment and discharging garnishees in cause No. 6300	23	20
Causes consolidated; jury empaneled; trial	23	20
Trial; motion of defendant for directed verdict overruled	24	21
Trial, verdict, and judgment	24	21
Judgment in cause No. 6250, February 23, 1927	24	22
Judgment in cause No. 6300, February 23, 1927	25	22
Record entry of filing of petition for writ of error, etc., in cause No. 6250	25	22
Record entry of filing of petition for writ of error, etc., in cause No. 6300	25	23
Petition for writ of error in cause No. 6250	25	23
Petition for writ of error in cause No. 6300	26	23
Assignment of errors in cause No. 6250	27	24
Assignment of errors in cause No. 6300	31	31
Order allowing writ of error, etc., in cause No. 6250 ...	74	77
Order allowing writ of error, etc., in cause No. 6300 ...	75	78
Record entry of filing of citation, etc., in cause No. 6250	75	78
Record entry of filing of citation, etc., in cause No. 6300	76	79
Bond on writ of error in cause No. 6250 (omitted in printing)	76	

	Original	Print
Bond on writ of error in cause No. 6300 (omitted in printing)	77	
Order extending time to file bill of exceptions in cause No. 6280	79	79
Order extending time to file bill of exceptions in cause No. 6300	79	80
Order further extending time to file bill of exceptions in cause No. 6280	79	80
Order further extending time to file bill of exceptions in cause No. 6300	80	81
Order extending time to file transcript in cause No. 6280	80	81
Order extending time to file transcript in cause No. 6300	81	82
Order further extending time to file bill of exceptions in cause No. 6280	81	82
Order further extending time to file bill of exceptions in cause No. 6300	81	83
Order further extending time to file transcript in cause No. 6280	82	83
Order further extending time to file transcript in cause No. 6300	82	84
Record entry of filing of bill of exceptions in cause No. 6280	83	84
Record entry of filing of bill of exceptions in cause No. 6300	83	85
Bill of exceptions	83	85
Caption	83	85
Opening statement on behalf of plaintiffs	84	86
Opening statement on behalf of defendant	90	92
Testimony for plaintiff	93	95
Testimony of Mrs. Imogene Johnson	93	95
Exhibit 1—Photograph of Mrs. Myrtle J. Johnson	97	98
Exhibit 2—Photograph of Mrs. Myrtle J. Johnson and Mrs. Imogene Johnson	101	100
Exhibit 3—Photograph of Mrs. Myrtle J. Johnson and two friends taken three weeks before accident	101	100
Testimony of Dr. St. Elmo Sanders	151	158
Exhibits 4a, 4b, 4c, 4h to 4k—Records of Grace Hospital reating to Myrtle Johnson	159	164
Testimony of Dr. Samuel H. Richman	191	181
Exhibit 4c—Record of Grace Hospital containing report of blood test of Myrtle Johnson	195	183
Testimony of Dr. R. C. Bahr	199	186
Dr. St. Elmo Sanders (recalled)	202	189
Mrs. Helen Elisberry	205	193
Exhibits 4i to 4r—Clinical record relating to Mrytle Johnson	211	197

	Original	Print
Testimony of Dr. Paul R. Clayton	225	198
Exhibit 5—X-ray photograph of right side of skull of Myrtle Johnson	229	200
Exhibit 6—X-ray photograph of left side of skull of Myrtle Johnson	233	201
Testimony of Walter C. Chaney	235	202
Exhibit 7—X-ray photograph of right side of skull of Myrtle Johnson	239	205
Exhibit 8—X-ray photograph of right side of skull of Myrtle Johnson	241	205
Exhibit 9—X-ray photograph of left side of skull of Myrtle Johnson	243	205
Exhibit 10—X-ray photograph of left side of skull of Myrtle Johnson	245	205
Testimony of W. J. Connor	259	219
Myrtle J. Johnson	268	229
Sue O'Bleness	316	280
Anna Blanche Bland	320	283
D. H. Smith	323	286
Mrs. Mary Ellwanger	325	288
Frances E. McCarron	328	292
Dr. Edward Geraghty	340	316
William H. Hines	358	337
Dr. Sherman Mella	359	338
F. W. Nelson	360	340
Murray H. Sure	362	341
Mrs. Marieta McDaniels	371	352
Dr. Paul Martin Krull	373	354
Motion of defendant for instructed verdict and overruling thereof	375	357
Testimony for defendant	376	358
Testimony of Dr. I. D. Simpson	376	358
Albert S. Kates	381	364
Emmy Matthews	384	368
Martin Kane	392	376
John B. McCormick	394	379
Jerome S. Connors	397	383
Walter I. Vertson	399	386
Edward Y. Chambers	410	399
Testimony for plaintiff in rebuttal	412	402
Testimony of Mrs. Imogene Johnson	413	402
Testimony of Mrs. Myrtle Johnson	416	406
Instructions to jury requested by defendant and refusal thereof	418	409
Argument to jury on behalf of plaintiff	420	410
Argument to jury on behalf of defendant	425	416
Court's charge to the jury and exceptions thereto	437	429
Approval of bill of exceptions by counsel	460	455
Approval of bill of exceptions by district judge	461	455
Stipulation as to exhibits and bill of exceptions in cause No. 6200	461	456

	Original	Print
Stipulation as to exhibits and bill of exceptions in cause No. 6220	462	456
Agreement between counsel as to record on writs of error	462	457
Praecipe for transcript	464	458
Clerk's certificate to transcript (omitted in printing)	466	
Motion for leave to file transcript and to consolidate two cases for hearing in case No. 8020	466	460
Motion for leave to file transcript and to consolidate two cases for hearing in case No. 8021	468	463
Order consolidating causes for hearing on one transcript of record	471	465
Appearances of counsel (omitted in printing)	472	
Argument and submission (omitted in printing)	474	
Opinion, Symes, J	475	466
Judgment, cause No. 8020	482	472
Judgment, cause No. 8021	483	473
Clerk's certificate (omitted in printing)	484	
Orders allowing certiorari	485	473

[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Atwood, Wickersham, Hill & Chilcott, filed April 11, 1927, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT, WESTERN MISSOURI

WRIT OF ERROR AND CLERK'S RETURN IN CAUSE NO. 6299—Filed April 11, 1927

UNITED STATES OF AMERICA, set:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the renditron of the judgment of a plea which is in the said Dis-[fol. 3] trict Court before you, at the November Term, 1926, thereof, between Edward H. Johnson, as Plaintiff, and New York Central Railroad Company, a corporation, as Defendant, a manifest error hath happened, to the great damage of the said New York Central Railroad Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the Tenth day of June, 1927, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of

Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court.

Issued at office in Kansas City, Mo., this 11th day of April, in the year of our Lord one thousand nine hundred Twenty-seven.

Edwin R. Durham, Clerk, by A. Vinick, Deputy Clerk.
(Seal.)

Allowed by Merrill E. Otis, Judge.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri, set:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in [fol. 4] the within entitled case, and with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said District Court of the United States for the Western Division of the Western District of Missouri.

Issued at office in Kansas City this 31st day of October, A. D. 1927.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy Clerk. (Seal U. S. Dist. Court, West. Div. West. Dist. of Mo.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR AND CLERK'S RETURN IN CAUSE NO. 6300—Filed April 11, 1927

UNITED STATES OF AMERICA, set:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, at the November Term, 1926, thereof, between Myrtle J. Johnson, as Plaintiff and New York Central Railroad Company, a corporation, as Defendant, a manifest error hath happened, to the great damage of the said New York Central Railroad Company, a corporation, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the Tenth day of June, 1927, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause to be done therein to cor-[fol. 5] rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the seal of said District Court.

Issued at office in Kansas City, Mo., this — day of April, in the year of our Lord one thousand nine hundred Twenty seven.

Edwin R. Durham, Clerk, by A. Vinick, Deputy Clerk.
(Seal.)

Allowed by Merrill E. Otis, Judge.

United States of America,
Western Division of the Western
District of Missouri, set:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said District Court of the United States for the Western Division of the Western District of Missouri.

Issued at office in Kansas City this 31st day of October, A. D. 1927.

Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy Clerk. (Seal U. S. Dist. Court, West. Div. West. Dist. of Mo.)

[File endorsement omitted.]

[Caption omitted]

[fol. 6] In United States District Court

Minute Entries

6299

Edward H. Johnson, Plaintiff,

vs.

New York Central Railroad Company, a Corporation, Defendant

Now on this day comes defendant by its Attorneys and files transcript of record on removal of this cause from the Circuit Court of Jackson County, Missouri; also files Answer, and also files motion to dissolve the attachment herein.

6300

Myrtle J. Johnson, Plaintiff,

vs.

New York Central Railroad Company, a Corporation, Defendant

Now on this day comes defendant by its Attorneys and files herein a transcript on the removal of this cause from the Circuit Court of Jackson County, Missouri, also answer and motion to dissolve attachment and discharge garnishee.

The Petitions, Petitions for Removal, Bonds on Removal, Notices of filing Petitions and Bonds for Removal, and Orders of Removal contained in said Transcripts, and the Answers, Motions to dissolve Attachment and Orders dissolving attachment filed herein, are in words and figures as follows:

Petition in Cause No. 6299

In Circuit Court of Jackson County, Missouri, at Independence, December Term, 1925

No. 56958

Edward H. Johnson, Plaintiff,

vs.

New York Central Railroad Company, a Corporation, Defendant

Petition—Filed Nov. 20, 1925

Comes now the above named plaintiff and states to the court that he is a citizen and resident of Kansas City, Jack-[fol. 7] son County, Missouri, and that defendant is a corporation duly organized and existing according to law, and at all the times herein mentioned, owned, controlled, maintained and operated a system of railroads between the cities of New York and Buffalo in the state of New York together with the necessary engines, cars and equipment thereto appertaining, and was engaged in the business of a common carrier for hire.

Plaintiff further states that he now and was at all the times herein mentioned the lawful husband of Myrtle J. Johnson and for cause of action against defendant alleged that on or about the 27th day of September, 1925, his said wife was aboard a train then and there being operated by defendant, she having paid to defendant the usual fare demanded by it and having been accepted for carriage aboard said train as a passenger for hire and was so being carried at the time when said train and the car in which plaintiff's said wife was riding reached a point at, or near or between the cities of Utica and Syracuse in the state of New York, when and where by and through the carelessness and neg-

ligence of the defendant, said train and the car in which plaintiff's said wife was riding was caused, suffered and permitted to suddenly, violently and unusually surge, lurch, jerk, jolt, sway, tilt and rock as a result of which plaintiff's said wife was thrown and precipitated from the place and position she occupied at said time and caused to fall and strike the parts of said car and hard surfaces thereof and be severely, grievously and permanently injured in the following particulars, to-wit:

Her back, body, limbs, and shoulders, and the nerves, blood vessels and muscles thereof were greatly bruised, contused, wrenched, twisted and injured; the flesh of her entire body and limbs were greatly bruised, contused, wrenched, twisted, strained and injured; her brain, nerves, spine and spinal cord were greatly bruised, contused, wrenched, twisted, strained and injured; her head, brain, and entire nervous system were greatly shocked, jarred, impaired and affected; she was greatly bruised, wrenched, twisted, crushed, and injured in and about her pelvis and abdominal regions; her kidneys, bladder, stomach, bowels, genital and urinary organs were bruised, contused, injured and affected and the functions were greatly impaired; her head was greatly bruised, contused, cut and lacerated; she suffered a concussion of the brain and has suffered and will in the future suffer great physical pain and mental anguish, unconsciousness forgetfulness, dizziness, headaches, nervousness, loss of weight and sleep, profound weakness, [fol. 8] exhaustion, impaired hearing and vision, impaired nerve supply, paralysis of her right side; impaired locomotion, impaired use of the muscles and nerves of her right side and the right side of her head and face, nausef, melancholia, and she was made sick, sore and lame and her general strength and ability to work and earn money and a livelihood has been and in the future will be, greatly lessened and impaired.

Plaintiff further alleges that by reason of the injuries and disabilities of his said wife, as aforesaid, he has been, and in the future will be deprived of the services and the consortium of the marital relations and of her society, and affection and every conjugal relation existing between them has been destroyed; that all of his said wife's injuries and disabilities, as aforesaid, are permanent and lasting

in their character and effect; that plaintiff has been compelled, and in the future will be compelled, to incur reasonable and necessary expenses for medicines, medical and surgical treatment, hospital bills and nursing bills in efforts to cure his said wife, and has been damaged as a direct result of the carelessness and negligence of the defendant, as aforesaid, in the sum of Ten Thousand Dollars ($10,000.00).

Wherefore plaintiff prays judgment against the defendant for the sum of Ten Thousand Dollars ($10,000.00)) together with his costs herein.

Atwood, Wickersham, Hill & Chilcott, by Clarence C. Chilcott, Attorneys for Plaintiffs.

State of Missouri,
County of Jackson, ss:

Clarence C. Chilcott of lawful age, being first duly sworn upon his oath deposeth and saith that he is agent and attorneys for the plaintiff herein and makes this affidavit for and on the behalf of plaintiff, and that plaintiff, Edward H. Johnson has a just demand against the New York Central Railroad Company, the defendant, and that the amount which defiant believes the plaintiff ought to recover after allowing all just credits and set-offs is Ten Thousand Dollars ($10,000.00) now due and that he has good reason to believe and does believe that the defendant is a non resident of the state of Missouri.

Clarence C. Chilcott.

[fol. 9] Subscribed and sworn to before me this 19th day of November, 1925. My commission expires May 24, 1928. Josephine Eckstein, Notary Public, Jackson County, Mo. (Seal.)

(Petition in Cause No. 6300)

IN CIRCUIT COURT OF JACKSON COUNTY, DECEMBER TERM, 1925

No. 56959

MYRTLE J. JOHNSON, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant

PETITION—Filed Nov. 20, 1925

Comes now the above named plaintiff and states to the court that she is a citizen and resident of Kansas City, Jackson County, Missouri, and that defendant is a corporation duly organized and existing according to law, and at all the times herein mentioned owned, controlled, maintained and operated a system of railroads between the cities of New York and Buffalo in the state of New York together with the necessary engines, cars and equipment thereto appertaining, and was engaged in the business of a common carrier for hire.

Plaintiff, for cause of action against the defendant, alleges that on or about the 27th day of September, 1925, she was aboard a train then and there being operated by defendant, plaintiff having paid to the defendant the fare demanded by it and having been accepted for carriage aboard said train as a passenger for hire and was so carried at all the times herein mentioned, that when said train reached a point at or near or between the cities of Utica and Syracuse, defendant carelessly and negligently caused, suffered and permitted said train and the car thereof in which plaintiff was riding to suddenly, violently and unusually surge, lurch, jerk, sway, tilt, and rock, as a direct result of which plaintiff was thrown and precipitated from the place and position she occupied at said time and caused to fall and strike the parts of said car and hard surface thereof and be severely, greviously and permanently injured in the following particulars, to-wit:

[fol. 10] Her back, limbs and shoulders, and the nerves, blood vessels and muscles thereof were greatly bruised, contused, wrenched, twisted and injured; the flesh of her entire body and limbs was greatly bruised, contused, wrenched, twisted and injured; the flesh of her entire body and limbs was greatly bruised, contused, wrenched, twisted, strained and injured; her head, brain, spine and spinal cord were greatly bruised, contused, wrenched, twisted, strained and injured; her brain, nerves and entire nervous system were greatly shocked, jarred, impaired and affected; she was greatly bruised, wrenched, twisted, crushed and injured in and about her pelvis and abdominal regions; her kidneys, bladder, stomach, bowels, genital and urinary organs were bruised, contused, injured, and affected and the functions were greatly impaired; her head was greatly bruised, contused, cut and lacerated; she suffered a concussion of the brain and has suffered and will in the future suffer great physical pain and mental anguish, unconsciousness, forgetfulness, dizziness, headaches, nervousness, loss of weight and sleep, profound weakness, exhaustion, impaired hearing and vision, impaired nerve supply, paralysis of her right side; impaired locomotion, impaired use of the muscles and nerves of her right side and the right side of her head and face, nausea, melancholia, and she was made sick, sore and lame and her general strength and ability to work and earn money and a livelihood has been and in the future will be, greatly lessened and impaired.

Plaintiff further alleges that she was confined to her bed and in the hospital for a long period of time and incurred great expense for medicines, medical and surgical treatment and will incur like expenses in the future for necessary medicines, medical and surgical treatment and hospital bills in efforts to cure herself; that she has lost and in the future will lose her earnings; that all of said injuries are permanent and lasting in their character and effect and were directly caused and brought about by the negligence and carelessness of the defendant as aforesaid, all to the damage of plaintiff in the sum of Twenty Five Thousand Dollars ($25,000.00).

Wherefore plaintiff prays judgment against defendant in the sum of Twenty-five Thousand Dollars ($25,000.00) together with her costs herein.

Atwood, Wickersham, Hill & Chilcott, by Clarence C. Chilcott, Attorneys for Plaintiff.

[fol. 11] State of Missouri,
County of Jackson, ss:

Clarence C. Chilcott, of lawful age, being first duly sworn upon his oath deposeth and saith that he is agent and attorney for the plaintiff herein and makes this affidavit for and on the behalf of plaintiff, and that plaintiff, Myrtle J. Johnson, has a just demand against the New York Central Railroad Company, the defendant, and that the amount which affiant believes plaintiff ought to recover after allowing all just credits and set-offs is Twenty Five Thousand Dollars ($25,000.00) now due and that he has good reason to believe and does believe that the defendant is a non-resident of the state of Missouri.

Clarence C. Chilcott.

Subscribed and sworn to before me this 19th day of November, 1925. My commission expires May 24, 1928. Josephine Eckstein, Notary Public, Jackson County, Mo. (Seal.)

[File endorsement omitted.]

In Circuit Court of Jackson County

Record Entry Petition for Removal, etc., Filed; Order of Removal, Nov. 28, 1925, in Cause No. 6299

Now on this day, this cause coming on for hearing upon the petition of defendant for an order removing this cause to the United States District Court, and it appearing to the court that the defendant has filed its petition for such removal in form of law, and has filed its bond in the sum of Five Hundred ($500.00) Dollars, with National Surety Company of New York as surety thereon, which said bond is by the court approved.

It is therefore ordered by the court that this cause be and the same is hereby removed from this court within and to the United States District Court for the Western Division of the Western District of Missouri, at Kansas City.

In Circuit Court of Jackson County

Record Entry Petition for Removal, etc., Filed; Order of Removal, Nov. 28, 1925, in Cause No. 6300

Now on this day, this cause coming on for hearing upon the petition of defendant for an order removing this cause to the United States District Court, and it appearing to the court that the defendant has filed its petition for such re-
{fol. 12} moval in form of law, and has filed its bond in the sum of Five Hundred ($500.00) Dollars, with National Surety Company of New York as surety thereon, which said bond is by the court approved.

It is therefore ordered by the court that this cause be and the same is hereby removed from this court within and to the United States District Court for the Western Division of the Western District of Missouri, at Kansas City.

In Circuit Court of Jackson County

Petition for Removal, Cause No. 6299—Filed Nov. 28, 1925

Now appearing for the sole and only purpose of presenting this petition for removal of this cause to the United States District Court for the Western Division of the Western District of the State of Missouri, comes the New York Central Railroad Company, a corporation and shows to this court that heretofore to wit: On the 20th day of November, 1925, the above suit, which is of a civil nature, was begun against your petitioner, the New York Central Railroad Company, a corporation, in the above court by the plaintiff Edward H. Johnson, filing a complaint in the above court against your petitioner and the issuance of a writ of attachment and summons therein against your petitioner.

That under the laws of the state of Missouri, your petitioner is not required to answer or plead to the said petition of the said Edward H. Johnson until December 7th, 1925.

That your petitioner has not appeared in said cause in any manner, neither has it filed any answer, demurrer or other pleadings of any kind therein; that in said petition so filed as aforesaid by the said Edward H. Johnson, the said Edward H. Johnson is seeking to recover damages in the sum of Ten Thousand ($10,000.00) Dollars of and from your petitioner on account of alleged personal injuries sustained by his wife Myrtle J. Johnson, through the alleged negligence of your petitioner by which said alleged personal injuries to his said wife Myrtle J. Johnson the said plaintiff, Edward H. Johnson alleges that he has been and in the future will be deprived of the service and consortium of the marital relations and of her affections and society and that every conjugal relation existing between the plaintiff and his wife, has been destroyed, and that the plaintiff will be compelled to incur reasonable and necessary expenses for medicines, medical and surgical treatment.

[fol. 13] That at the time said suit was instituted and continuously thereafter, up to the present time, the said Edward H. Johnson was and still is, a resident and citizen of the county of Jackson, State of Missouri, residing in Kansas City, said county and state; and your petitioner, the defendant, the New York Central Railroad Company was, at all the said times and dates, and still is, a railroad corporation organized and existing under and by virtue of the laws of the state of New York with its principal office in the city of New York in said state.

That the matters in dispute in said suit and for which said suit is brought, exceed the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

Your petitioner offers herewith, a bond with good and sufficient surety for its entry in the District Court of the United States for the Western Division of the Western District of the State of Missouri within thirty (30) days from the date of filing this petition for removal, a copy of the record in this state, and for paying all costs that may be awarded by the said District Court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto; that the said bond is in the penal

sum of Five Hundred ($500.00) Dollars, and is executed by your petitioner as principal, and National Surety Company of New York, a corporation, as surety.

Your petition- therefore prays this Honorable Court for the removal of this suit before the trial thereof into the District Court of the United States for the Western Division of the Western District of the State of Missouri; and that this Honorable Court proceed no further herein, except to make an order for the removal of this cause to the United States District Court; and to accept said surety and bond; and to cause the record herein to be removed to the District Court of the United States for the Western Division of the Western District of Missouri, and it will ever pray.

The New York Central Railroad Company, a Corporation, by Marley & Reed, Its Attorneys.

Duly sworn to by Albert S. Marley. Jurat omitted in printing.

[fol. 14] [File endorsement omitted.]

In Circuit Court of Jackson County

Petition for Removal. Cause No. 6300—Filed Nov. 28, 1925

Now appearing for the sole and only purpose of presenting this petition for removal of this cause to the United States District Court for the Western Division of the Western District of the State of Missouri, comes the New York Central Railroad Company, a corporation and shows to this court that heretofore, to wit: On the 20th day of November, 1925, the above suit which is of a civil nature, was begun against your petitioner the New York Central Railroad Company, a corporation, in the above court by the plaintiff Myrtle J. Johnson, filing a complaint in the above court against your petitioner and by the issuance of a writ of attachment and summons therein against your petitioner. That under the laws of the state of Missouri your petitioner is not required to answer or plead to the said petition of the said Myrtle J. Johnson, until December 7th, 1925.

That your petitioner has not appeared in said cause in any manner, neither has it filed any answer, demurrer or

other pleading of any kind therein; that in said petition so filed as aforesaid by the said Myrtle J. Johnson, the said Myrtle J. Johnson is seeking to recover damages in the sum of Twenty-five Thousand ($25,000) Dollars of and from your petitioner on account of alleged personal injuries sustained by her through the alleged negligence of your petitioner, by which said alleged personal injuries the said plaintiff, Myrtle J. Johnson, alleges herself to be incapacitated and injured, her body and limbs bruised, contused, wrenched, her head, brain, spine and spinal cord were greatly bruised and injured; and that she suffered a concussion of the brain, paralysis of her right side and that her ability to work and earn money and livelihood have been greatly impaired.

[fol. 15] That at the time said suit was instituted and continuously thereafter set up to the present time, the said Myrtle J. Johnson was and still is, a resident and citizen of the county of Jackson, and state of Missouri, residing in Kansas City, said county and state; and your petitioner, defendant, the New York Central Railroad Company, was at all said times and dates and still is, a Railroad Corporation organized and existing under and by virtue of the laws of the state of New York with its principal office in the city of New York in said state.

That the matters in dispute in said suit and for which said suit is brought exceed the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs.

Your petitioner offers herewith, a bond with good and sufficient surety for its entry in the District Court of the United States for the Western Division of the Western District of the state of Missouri, within thirty (30) days from the date of filing this petition for removal, a copy of the record in this suit, and for paying all costs that may be awarded by the said District Court of the United States, if said court shall hold that this suit was wrongfully and improperly removed thereto; that the said bond is in the penal sum of Five Hundred ($500.00) Dollars and is executed by your petitioner as principal and National Surety Company of New York, a corporation, as surety.

Your petitioner therefore prays this Honorable Court for the removal of this suit before the trial thereof, into the District Court of the United States for the Western Di-

vision of the Western District of the State of Missouri; and that this Honorable Court proced no further herein, except to make an order for the removal of this cause to the said United States District Court; and to accept said surety and bond; and to cause the record herein to be removed to the District Court of the United States for the Western Division of the Western District of Missouri and it will ever pray.

The New York Central Railroad Company, by Marley & Reed, Its Attorneys.

Duly sworn to by Albert S. Marley. Jurat omitted in printing.

[fol. 16] [File endorsement omitted.]

Bond on Removal for $500.00, Cause No. 6299, approved and filed November 28, 1925, omitted in printing.

[fol. 17] Bond on removal for $500.00, cause No. 6300, approved and filed November 28, 1925, omitted in printing.

[fol. 18] In Circuit Court of Jackson County

Notice of Filing Petition and Bond for Removal Cause No. 6299—Filed Nov. 28, 1925

To Atwood, Wickersham, Hill and Chilcott, attorneys for above-named plaintiff:

Please take notice that the defendant, the New York Central Railroad Company, a corporation will, on Saturday, the 28th day of November, 1925, at the hour of 9:30 o'clock [fol. 19] a. m. or so soon thereafter as counsel can be heard, move the court for an order removing the above cause to the District Court of the United States for the Western Division of the Western District of Missouri, in accordance with the petition and bond of the said defendant, copies of which are hereto attached.

Marley & Reed, Attorneys for the New York Central Railroad Company.

Dated this 27th day of November, 1925.

Received copy of the above and foregoing notice, together with copies of the petition and bond for removal therein mentioned, this 27th day of November, A. D. 1925.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Plaintiff.

[File endorsement omitted.]

In Circuit Court of Jackson County

Notice of Filing Petition and Bond for Removal Cause No. 6300—Filed Nov. 28, 1925

To Atwood, Wickersham, Hill and Chilcott, attorneys for the above-named plaintiff:

Please take notice that the defendant, The New York Central Railroad Company, a corporation, will, on Saturday, the 28th day of November, 1925, at the hour of 9:30 o'clock A. M. or so soon thereafter as counsel can be heard, move the court for an order removing the above cause to the District Court of the United States for the Western Division of the Western District of Missouri in accordance with the petition and bond of the said defendant, copies of which are hereto attached.

Marley & Reed, Attorneys for the New York Central Railroad Company.

Dated this 27th day of November, A. D. 1925.

[fol. 20] Received copy of the above and foregoing notice, together with copies of the petition and bond for removal therein mentioned, this 27th day of November, A. D. 1925.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Answer in Cause No. 6289—Filed Dec. 1, 1925

Now comes The New York Central Railroad Company, a corporation, the above named defendant and for answer to the plaintiff's petition herein, admits that the plaintiff is

and was at all the times and dates in plaintiff's petition mentioned, a resident and citizen of Kansas City, County of Jackson, state of Missouri, and admits that at all the times and dates mentioned in plaintiff's petition it was, has since continuously been and now is, a railroad corporation, organized and existing according to law with its principal place of business in the City of New York and state of New York.

And for further answer to plaintiff's petition this defendant denies each and every allegation thereof except such as have been hereinbefore specifically admitted.

Marley & Reed, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Answer Cause No. 6300—Filed Dec. 1, 1925

Now comes New York Central Railroad Company, a corporation, the above named defendant and for answer to the plaintiff's petition herein, admits that the plaintiff is and was at all the times and dates in plaintiff's petition mentioned, a resident and citizen of Kansas City, County of Jackson and state of Missouri, and admits that at all the times and dates mentioned in plaintiff's petition it was, has since continuously been and now is, a railroad corporation, organized and existing according to law with its principal place of business in the City of New York and state of New York.

[fol. 21] And for further answer to plaintiff's petition this defendant denies each and every allegation thereof except such as have been hereinbefore specifically admitted.

Marley & Reed, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Motion to Dissolve Attachment and Discharge Garnishees in Cause No. 6299—Filed Dec. 1, 1925

Now comes The New York Central Railroad Company, the above named defendant and respectfully shows to the court that the above action was instituted in the Circuit Court of Jackson County, Missouri at Independence by attachment isued on the ground that this defendant was a non-resident corporation of the state of Missouri; that in the said proceeding a writ of attachment was issued against this defendant directed to the sheriff of Jackson County, Missouri, and under said writ the said sheriff levied writs of garnishment upon the Kansas City Terminal Railway Association, a corporation, the Kansas City Southern Railway Company, the Missouri Pacific Railway Company et al., in the manner as shown by the return of the said sheriff of Jackson County, Missouri, set forth in the transcript of said cause duly certified by the clerk of said Circuit Court of Jackson County, Missouri, in this court; that this defendant has filed in this court its answer to the petition of the plaintiff, by reason whereof the said writ of attachment should be dissolved.

Wherefore, this defendant moves the court to make an order dissolving the said writ of attachment and discharging the garnishee summoned by the said sheriff of Jackson County, Missouri, under the said writ of attachment, and it will ever pray.

Marley & Reed, Attorneys for Defendant.

Received copy of the above and foregoing motion, together with copy of answer filed herein in the above cause and hereby consent that the said writ of attachment issued [fol. 22] thereunder be dissolved and the garnishees thereunder be at once released.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Plaintiff.

Dated this 1st day of December, 1925.

[File endorsement omitted.]

In United States District Court

Motion to Dissolve Attachment and Discharge Garnishees in Case No. 6300—Filed Dec. 1, 1925

Now comes New York Central Railroad Company, the above named defendant and respectfully shows to the court that the above action was instituted in the Circuit Court of Jackson County, Missouri, at Independence by attachment issued on the ground that this defendant was a non-resident of the state of Missouri; that in the said proceding a writ of attachment was issued against this defendant directed to the sheriff of Jackson County, Missouri, and under said writ the said sheriff levied writs of garnishment upon the Kansas City Terminal Railway Association, a corporation, the Kansas City Southern Railway Company, the Missouri Pacific Railway Company, et al., in manner as shown by the return of the said sheriff of Jackson County, Missouri, set forth in the transcript of said cause duly certified by the clerk of said Circuit Court of Jackson County, Missouri, in this court; that this defendant has filed in this court its answer to the petition of the plaintiff, by reason whereof the said writ of attachment should be dissolved.

Wherefore this defendant moves the court to make an order dissolving the said writ of attachment and discharging garnishees summoned by the said sheriff of Jackson County, Missouri, under the said writ of attachment, and it will ever pray.

Marley & Reed, Attorneys for Defendant.

Received copy of the above and foregoing motion, together with copy of answer filed herein in the above cause and hereby consent that the said writ of attachment issued [fol. 23] thereunder be dissolved and the garnishees thereunder be at once released.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Plaintiff.

Dated this 1 day of December, 1925.

[File endorsement omitted]

In United States District Court

Order Dissolving Attachment and Discharging Garnishee in Cause No. 6299—Filed Dec. 1, 1925

Now comes The New York Central Railroad Company, the above named defendant and presents to the court its motion to dissolve the attachment herein and it appearing to the court that the said defendant has filed its answer herein and that the plaintiff has consented thereto, it is hereby ordered that the said attachment be dissolved and the garnishees summoned thereunder by the sheriff of Jackson County, Missouri, be and they are hereby discharged at once.

Albert L. Reeves, Judge.

[File endorsement omitted.]

In United States District Court

Order Dissolving Attachment and Discharging Garnishees in Cause No. 6300—Filed Dec. 1, 1925

Now comes New York Central Railroad Company, the above named defendant and presents to the court its motion to dissolve the attachment herein and it appearing to the court that the defendant has filed its answer herein and that the plaintiff has consented thereto, it is hereby ordered that the said attachment be dissolved and the garnishees summoned thereunder by the sheriff of Jackson County, Missouri, be and they are hereby discharged at once.

Albert L. Reeves, Judge.

[File endorsement omitted.]

In United States District Court

Record Entry, Feb. 21, 1927, Cases Consolidated; Jury Impaneled; Trial

This day the above entitled causes coming on for hearing it is ordered by the court that they be consolidated for the [fol. 24] purpose of trial; and both plaintiffs and defend-

ant announcing ready for trial a jury is ordered and comes as follows: F. A. Baker, Frank Schneider, Walter Gilham, Charles L. Carter, J. Harvey Douglas, W. R. Douglass, F. J. Pierce, J. H. Platner, Kelly White, C. W. Jenkins, Charles Payson and Frank Lowrey, twelve good and lawful men from the body of the Western District of Missouri who are duly impaneled and sworn to try the issue joined and a true verdict render according to the law and the evidence in the cases; thereupon opening statements are made and testimony is introduced on behalf of the plaintiffs, and not being concluded at the hour of adjournment further proceedings are postponed until tomorrow morning.

Record Entry Trial, Feb. 22, 1927

This day again comes the parties by their respective counsel, also comes the jury trying this cause into open court, and the trial is resumed and further testimony is introduced on behalf of the plaintiffs; and plaintiffs rest; Defendant files motion for an instructed verdict in each case, which is considered by the court and denied; and testimony is introduced on behalf of the defendant and defendant rests; Rebuttal testimony on behalf of the plaintiffs is introduced and plaintiffs rest. At the close of all the testimony defendant files and renews its motions for directed verdict, which are refused by the court; thereupon arguments and instructions are postponed until tomorrow morning.

In United States District Court

Record Entry Trial, Feb. 23, 1927; Verdicts and Judgments

Come now again the parties by their respective counsel, also comes the jury into open court and the trial is resumed; and the jury, after hearing the arguments of counsel and the instructions of the court, retire to consider of their verdicts; thereafter the jury returned into open court the following verdicts:

No. 6299

EDWARD H. JOHNSON, Plaintiff,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant

Verdict

We, the jury, find the issue in favor of the plaintiff and against the defendant and assess his damages at the sum of $10,000.00.

Chas. L. Carter, Foreman.

[fol. 25] It is therefore, ordered, adjudged and decreed by the court that the plaintiff have and recover of the defendant the New York Central Railroad Company, the sum of Ten Thousand ($10,000.00) Dollars, together with his costs accrued in this cause and have execution therefor.

No. 6300

MYRTLE J. JOHNSON, Plaintiff,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant

We, the jury, find the issues in favor of the plaintiff and against the defendant and assess plaintiff's damages at the sum of $25,000.00.

Chas. L. Carter, Foreman.

It is therefore ordered, adjudged and decreed by the court that the plaintiff have and recover of the defendant, the New York Central Railroad Company, the sum of Twenty-five Thousand ($25,000.00) Dollars, together with her costs accrued in this cause of action and have execution therefor.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY PETITION FOR WRIT OF ERROR AND ASSIGNMENT OF ERRORS IN CAUSE NO. 6299—Filed Apr. 11, 1927

This day comes defendant by its attorney and files Petition for Writ of Error together with its Assignment of Errors.

In United States District Court

Record Entry Petition for Writ of Error and Assignment of Errors in Cause No. 6300—Filed Apr. 11, 1927

This day comes the defendant by its attorneys and files its Petition for a Writ of Error together with its Assignment of Errors.

In United States District Court

Petition for Writ of Error in Cause No. 6299—Filed April 11, 1927

Now comes New York Central Railroad Company, a corporation, defendant herein, and says that on or about the 23rd day of February, 1927, this court entered judgment herein in favor of the plaintiff, Edward H. Johnson and against this defendant, New York Central Railroad Company, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to [fol. 26] the prejudice of this defendant, all of which will more in detail, appear from the assignment of error which is filed with this petition.

Wherefore, this defendant, New York Central Railroad Company prays that writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said Court of Appeals.

A. S. Marley, W. Haley Reed, Attorneys for Defendant, New York Central Railroad Company.

[File endorsement omitted.]

In United States District Court

Petition for Writ of Error in Cause No. 6300—Filed April 11, 1927

Now comes New York Central Railroad Company, a corporation, defendant herein, and says that on or about

the 23rd day of February, 1927, this court entered judgment herein in favor of the plaintiff, Myrtle J. Johnson, and against this defendant, New York Central Railroad Company, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this defendant, New York Central Railroad Company, prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Court of Appeals.

A. S. Marley, W. Haley Reed, Attorneys for Defendant, New York Central Railroad Company.

[File endorsement omitted.]

[fol. 27] In United States District Court

6289. In Law

Edward H. Johnson, Plaintiff,

vs.

New York Central Railroad Company, a Corporation, Defendant

Assignment of Errors

Now comes the New York Central Railroad Company, a corporation, plaintiff in error, by Marley & Reed, its attorneys and in connection with its petition for writ of error says that in the record, proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the plaintiff in error as follows, to wit:

First. The Court committed error in consolidating for trial together over the objections and exceptions of the New York Central Railroad Company, the case of Edward

H. Johnson, Plaintiff, vs. New York Central Railroad Company, defendant, number 6,299, with the case of Myrtle J. Johnson, plaintiff, vs. New York Central Railroad defendant, number 6,300.

Second: The Court committed error, over the objections and exceptions of the defendant New York Central Railroad Company in overruling the said Defendant's objection to the introduction of evidence in support of the Plaintiff's petition for the reason that the said petition did not state a cause of action against the defendant Railroad Company.

Third. The Court committed error in admitting, over the objections and exceptions of the defendant New York Central Railroad Company the answer of the witness Dr. St. Elmo Sanders, to the following hypothetical question, to wit:

"Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train in the State of New York, and between the hours of eleven and twelve at night, and was in a Pullman car, the train at the time going west, and she stood in the aisle holding on to a curtain with her right hand towards the rear portion of the berth, near the partition between it and the berth just back of it, and while standing in that position in the aisle there was a sudden stopping, a lurch, a jerk of the train, and she was [fol. 28] thrown around, to strike her head upon a portion of the upper berth, and then was caused to lose her hold upon the curtain and thrown to the floor—that was the left side of her head that was struck, and she was thrown to the floor; and in a very short space of time afterwards a companion with her came to her to pick her up, and she was holding her head and saying 'Oh, my head, Oh my head' and appeared dazed; and then they picked her up and put her on the side of the berth, and later took her to the women's dressing room at the end of the car and bathed her face, and later undressed her and put her to bed, and that it was some difficulty and a considerable length of time to get to sleep, perhaps more than an hour, and then the next day late in the morning towards noon that she awoke and her right side, arm and leg were cold,

numb, clammy and she hadn't full power to control the motor nerves and the muscles of the arm and leg, and she then—and her face was drawn downward to the left and that she couldn't talk normally, but muttered; that with difficulty she could swallow, eat but little, and that she then arrived in Chicago that afternoon and was taken off the train, put in a wheel chair, and then from there taken to another station in Chicago and there put upon a train and brought to Kansas City, and then taken to your hospital; assuming those facts to be true, I will ask you if the conditions which you have testified to here, that you found her in when you made your examination and accorded her treatment in your opinion could be caused by such a blow and violence.

Mr. Marley: Wait a minute, I object to that, Your Honor, as including elements that are not proper elements to be considered in a hypothetical question. As I understand, the condition to which the testimony has been given would be dependent upon her physical condition; the condition of the head. These others are not elements indicative of the cause at all; and I contend that in order to put the proper hypothetical question, it would be necessary to include the condition of the woman, the blow on the head, and the effect, or the judgment as to the cause of the blow, and the effect of the blow upon the human brain; and I contend that these other elements which he has mentioned are not proper elements to include in a hypothetical question to show the cause of the injury. We object to it as incompetent.

The Court: Overruled.

Mr. Marley: I desire to save an exception, Your Honor.

[fol. 29] By Mr. Wickersham:

Q. I want to add to that question these further facts: That you may assume to be true; that she was a woman who weighed in the neighborhood of one hundred fifty to one hundred sixty pounds; that she was about thirty one years of age; married; that for several years she had been a hair dresser in business here in Kansas City; that she had not had any ailments from the time that she was a little child, the cutting of teeth; that within the month prior

to this accident and injury that I have mentioned she went on a train from Kansas City to Los Angeles, California, and from there by boat to San Francisco, attending a Convention, and went to Sacramento and various side trips, and from there up to Victoria, Canada, and to Banff, and from there to St. Paul and Chicago; to New York, where she was for several days looking after hair dressing appliances and during that time was in normal health; and went from New York the day before this happening to Nyack, New York, some forty-odd miles north of New York City, and remained there for a day and a half, and walked about and appeared normal and enjoying ordinary health.

Now, assuming all the facts which I have given in the original and supplemented question, I will ask you if in your opinion the blow and violence, such blow and violence as I have indicated in the question, could cause the result to which you have testified.

Mr. Marley: We desire to object to the question for the reasons given to the other question, and for the further reason that it is assuming facts that are not in evidence.

The Court: One of them, at least is not in evidence; that was that she had been in good health from childhood.

Mr. Wickersham: Withdraw that portion of the question, Doctor, if there is any question about that; and if there are any other facts that counsel thinks I have not included in the question I ask him now to indicate them.

Mr. Marley: My contention is, and I will indicate this; that in order to determine her condition, he would have to take into consideration the nature and extent of this blow, and to further show that it could not have been caused in any other manner; could not be reasonably apprehended to have been caused in any other manner, and that is entirely omitted in this case. In other words, to make my point clear, the evidence might indicate, by his examination and from his knowledge of it, that—and from the treatment he was giving of iodide of potassium—that there was an- [fol. 30] other cause or condition in there that should be taken into consideration.

The Court: Objection overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

Mr. Wickersham: You may answer.

A. I would say the condition such as I found might have been caused by such a blow as she had on her head."

Fourth. The Court erred in admitting, over the objections and exceptions of defendant New York Central Railroad Company, the following answer as to what he found on the left side of skull by the witness, Dr. Walter C. Chaney:

"Q. So I understand you take the left and right side of the skull, these pictures, and put them some distance apart, and by looking into mirrors with electric lights you use, you get a rounded view of the skull?

A. Take two pictures of the left side, and put them together and it gives us a rounding view, so that we are looking into the skull.

Q. Now, did you do that with these pictures I have offered in evidence?

A. Yes, sir.

Q. Did you read them?

A. Yes, sir.

Q. Please tell the Jury what you found if anything upon the left side of the skull?

Mr. Marley: We object to that because it embodies something that is not here. Now, if he will bring this machine here, so that we will have a chance to verify his reading, well and good, but these other experts have been called in, nothing has been said about this kind of a 'scope' and we object, incompetent and doesn't give us the proper opportunity to test out his testimony in that regard.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

By Mr. Wickersham:

Q. Go on and tell us, Doctor.

A. On the left side of the skull in this case there is a building up process in the region of the anterior part of the [fol. 31] region on the side of the head, the parietal bone back of the juncture of the frontal bone and well up towards the curve on the top of the head, there is a lack of a shadow due to the thickening there, thickened condition."

Fifth. The Court committed error in admitting, over the objections and exceptions of Defendant, New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney to the following question, to-wit:

Q. Now, in order to carry out the idea of the Judge, is there any thickness there sufficient in your opinion to cause any effect on the motor nerves of the brain?

Mr. Marley: Object, because we don't know and he doesn't know what the thickness is, and until he does, he could hardly know what the effect would be.

The Court: He can answer that question. Read the question.

(Question read as above recorded.)

A. Yes, sir."

Sixth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney to the following question, to-wit:

"Q. Doctor, would violence applied to the left side of the skull at the point where you indicated there is a thickening, in your opinion cause or might cause a paralysis of the right side of the body?

Mr. Marley: Objection, incompetent, and too broad in its scope.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. Yes, sir.

Seventh. The Court committed error in admitting, over the objections and exceptions of the defendant New York

Central Railroad Company, the answer as to thickening of skull to the following question by the witness, Dr. Walter C. Chaney, to-wit:

"Q. That length of time had elapsed. Will you explain to the jury how it comes about that you can have a thicken-[fol. 32] ing as shown in those pictures such as you have testified to in February, 1927, that isn't shown in the picture of September, 1925?

Mr. Marley: Object, incompetent. The witness has not shown himself familiar with the situation and [and] facts upon which to base an opinion, and it would be merely conjecture as far as he is concerned.

The Court: Overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still except.)

A. I will have to answer that from the things that usually take place following an injury to the head such as she was supposed to have had here. A slight hemorrhage under the periosteum of the skull on that side would become organized and form a slight bony plate on the inner side of the skull; or the injury may have been to the covering of the skull—covering of the brain I mean, in which you get a thickened hardening of the dura mater of the brain.

Mr. Marley: I object to that. There is not evidence here of the thickening of the dura mater of the brain, but to the pia mater of the brain on the inside and not the outside.

Mr. Wickersham: I know, but who says so?

Mr. Marley: I take it the witness is undertaking to testify with reference to the things that you have been developing in evidence in this case, and not roaming over the realm of speculation to base his opinion.

The Court: I understand he is trying to explain the difference between these two pictures, showing the difference on these two different dates.

Mr. Marley: Now, in undertaking to explain that difference he goes beyond and gives a reason other than that indicated by the testimony in this case.

The Court: According to the Court's opinion, his answer is in the realm of propriety under the law and evidence, and the objection is overruled.

(To which action and ruling of the Court the New York Central Railroad Company duly excepted at the time and still except.)

Mr. Wickersham: Go on Doctor.

[fol. 33] A. In either case, the thickening, the x-ray picture would show on the side of the skull as if it was fastened direct to the skull, whether it was on the inner side of the skull, a thickening up of the bony structure due to hemorrhage or whether due to a lick causing the membrane to come back and hit the skull, or thickening of the dura mater, either would make a thickened tissue for the light to go through, and consequently there wouldn't be a shadow ence, he goes beyond and gives a reason other than that inproduced."

Eighth. The Court committed error in admitting over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney to the question, as follows to-wit:

"Q. Now, Doctor, does it take any appreciable period of time for this thickening to take place and grow there? In other words, may you have a blow received upon the left side of the head at the point we have in mind, on the 27th day of September, 1925, and cause some lesion to the dura mater or pia mater, of the tissues of the brain, with a resultant hemorrhage and a thickening of the part that is injured by this lesion, not taking place for some time, some period of time afterwards, after the reception of the blow?

Mr. Marley: That is objected to as incompetent, and omitting matters that ought to be included in the question. This witness, as I understand it, has not shown himself familiar with the condition of this patient excepting to the extent of having taken an x-ray of the skull, and along the line of testimony that they are trying to bring out now, if he had examined the witness and was familiar with it, or he would take the history of the case, then he might be in a position to express the opinion that they are asking him

now, but I don't believe he is in a position now to answer that question, as a competent expert, and object to it for that reason.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. It would take some time for the organization of the clot to form the new tissue, which would cause a thickening.

Mr. Marley: Move to strike that out as incompetent, too broad in its scope and too indefinite.

[fol. 34] The Court: Motion overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

Ninth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer as to clot of scar tissue or lesions in brain of witness Dr. Walter C. Chaney, to the following question, to-wit:

By Mr. Wickersham:

"Q. Have you taken pictures of patients with skull injuries at various periods of time after reception of the injury?

A. Yes, sir.

Q. Have you noted in your long experience of twenty-one years that there may be a clot of scar tissue lesions on the brain?

A. Yes, sir.

Mr. Marley: Object to that as incompetent, because in order to make those things competent, there should be a similarity of situation. I don't believe he can go and speculate as to any kind of injury. I don't understand he is trying to qualify the man. What he is trying to do is to get the opinion of a man on a situation that is here before the jury and yet is asking him questions on a situation that is not similar at all, and I object to it for that reason as incompetent.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

By Mr. Wickersham:

Q. You may answer.
A. Yes, sir.

Tenth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Walter C. Chaney, to the question as follows, to-wit:

By Mr. Wickersham:

"Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train and standing in the aisle of a Pullman, holding on to curtain of a berth, and there was a sudden lurch of the train which threw her around forward as the train was going so as to strike her [fol. 35] head against the upper berth, and she was thrown to the floor, and that she was dazed at the time crying 'Oh, my head, Oh, my head' and then later, or something perhaps an hour or two afterwards, she was put to bed and went to sleep, and this occurred between eleven and twelve o'clock at night, and next morning, shortly before noon, when she was awakened, that there was a partial paralysis of the right leg and side and arm and a twisting of her face, and an inability to speak plainly, and then she was brought from New York, where it happened, State of New York, to Kansas City, and out to the Grace Hospital, and these pictures were taken on the 29th day of September, as you have read them, and then her paralysis of the right side got some better so that she could use her right hand and arm and leg somewhat better, and her speech improved some, and then you took these pictures of her on the 16th day of this month, and that there is that thickened area which appears in the picture that you took a few days ago, and does not appear in the pictures that were taken on the 29th day of September, 1925. Is that any indication to you as a professional man of the growth of any scar tissue in the covering of the brain?

Mr. Marley: Object to that as incompetent and including elements that I don't think ought to be in the question, and I object to it for that reason.

The Court: Overruled.

(To which action and ruling of the court the New York Central Railroad Company duly excepted at the time and still except.)

By Mr. Wickersham:

"Q. What is your answer?

A. Yes, sir.

Eleventh. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney, to the following questions, as follows, to-wit:

"Q. Now, Doctor, I will ask you, if in your opinion, this thickening there, which you have described, could in your opinion be caused by the blow and the violence indicated in my last question?

Mr. Marley: Object to the question for the same reasons heretofore given for previous questions similar to this.

The Court: Overruled.

[fol. 36] (To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. I would think so."

Twelfth. The Court committed error in admitting, over the objections and exceptions of the Defendant, New York Central Railroad Company, the answer of the witness, Dr. W. J. Connor, as to blow or injury being sufficient to cause Myrtle Johnson's condition, to the question as follows, to-wit:

"Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was in a normal condition of health, has been on a trip from Kansas City to Los Angeles and San Francisco, Victoria, Vancouver, St. Paul, Chicago to New York, attending to business, convention, and to purchase certain appliances for hair dressing, and walked

about actively and freely, and on the night of September 27th, 1925, she was riding in a train going from New York to Chicago, somewhere between eleven and 12 o'clock at night, while in a Pullman, standing in the aisle adjacent to her berth and holding with her right hand to the curtains near the partition of the next berth behind it, facing in a general direction the way the train was going, and that there was a sudden lurch of the train, and that she was thrown forward and around and struck the left side of her head against the upper berth and was thrown to the floor, and that she was in a dazed condition and crying 'Oh, my head, Oh my head,' and that she was then picked up and put on the edge of the berth a little while and then taken back to the lady's dressing room, and in a short while water was put upon her face, and she was undressed and put night clothes on, and taken back to her berth, and in an hour or so got to sleep, and next morning late, or about noon when she awakened, the right side was paralyzed, unable to move the right arm and leg, and it was cold and clammy and that her face was drawn down on the right and inability to talk plainly, and she left the train in Chicago in the afternoon, taken off the train and put in a wheel chair and later put upon another train and brought to Kansas City to the Grace Hospital and remained there for some nine or ten days, and during that time she was paralyzed as I have indicated, and there was some improvement in the use of her right side and improvement in her speech to some extent, and that she was released from there and went to her home and then was in the condition you have described. I will ask you sir, if in your opinion [fol. 37] as a physician, the blow and violence which I have indicated in this question in your opinion was sufficient to cause this result which I have indicated?

Mr. Marley: We object, incompetent. He hasn't shown himself qualified to answer questions in reference to nervous diseases and brain diseases. As I understand he is an Osteopath, and as I understand, he is dealing with the bone situation, rather than the nerves and blood vessels and tissues of the body and brain, and in addition to that, it involves improper elements.

Mr. Wickersham: Will you indicate what it is?

Mr. Marley: My contention is that the detail of being carried in a chair and all these other minor matters are not elements to be included in the determination of whether or not her conditions was caused by a blow.

The Court: Doctor, keep this question in your mind, so that it won't be necessary to repeat it.

Mr. Wickersham: Now, Doctor, there is some question raised as to the qualifications you have to answer that question. I want you to tell the Court and Jury what experience you have had with head injuries and patients who are paralyzed partly so, hemiplegia and the like.

Mr. Marley: I object to that, people can have hemiplegia and all, different strokes of paralysis without being affected with injury at all.

Mr. Wickersham: I want to get his experience.

The Court: Show first his qualifications and then his experience.

By Mr. Wickersham:

Q. Tell what school you are a graduate of.

A. I am a graduate of the American School of Osteopathy at Kirksville.

Q. And in that school, are you required in your course of study to make a full and exhaustive study of the nerves and bones and muscles and other parts of the body?

Mr. Marley: Object.

The Court: Objection overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

[fol. 38] A. Yes, sir; we study any part of the body just as thoroughly as in any medical school in the world.

Q. And did you do so?

A. Yes, sir.

Q. And graduated?

A. Yes, sir.

Q. Now what has been your experience in the treating of traumatism, traumatic cases?

A. They are very rare; not seen many traumatic cases. I have seen plenty of older people, but it is unusual, a traumatic injury of that kind is not usual.

Q. But it does happen?
A. It does happen.
Q. Now, what experience now, have you had to enable you to determine the cause and effect of paralytic conditions?

Mr. Marley: I think, Your Honor, it is about traumatic conditions. It isn't a question of any other condition, but a question of traumatic condition.
The Court: Limit the condition to a paralytic condition from a traumatic cause.

Mr. Wickersham: What experience have you had?
A. I have seen a number of cases.

The Court: Your experience in this connection includes not only the personal cases you have had, but experience of others gained by reading, etc.

By Mr. Wickersham: In your knowledge and reading and study of text books—have you done that?
A. Yes, sir.
Q. Are you familiar with the standard works upon anatomy?
A. Yes, sir.
Q. And nervous disorders?
A. Yes.
Q. And books that cover the subject of paralysis?
A. Yes, sir.
Q. And head injuries?
A. Yes, sir.
Q. And you are familiar with the standard works on what is etiology and works on those questions?

The Court: You may answer the hypothetical question.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

Mr. Wickersham: Assuming all these facts I gave you in the hypothetical question to be true, I will ask you in your opinion whether the blow and injury indicated in that ques-[fol. 39] tion might be sufficient to cause the condition which you have testified to here?

Mr. Marley: Renew my objection, so as to keep the record straight.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. Yes, sir; it would.

Thirteenth. The Court committed error in admitting, over the objections and exceptions of the defendant, New York Central Railroad Company, the answer of the witness, Dr. W. J. Connor, that Myrtle Johnson's condition was due to trauma, to the following question, to wit:

"Q. Now, is there anything in the way she walks, the way she picks up and uses this right leg, that indicates to you whether that condition is due to traumatism or due to any disease?

Mr. Marley: Object to that, it is incompetent. He hasn't shown he is familiar with diseases of the kind I think he is alluding to. I don't believe that the witness has shown himself fully qualified to answer the question.

The Court: Objection overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. I get my information wholly from books as I never held a post mortem on a case of that kind.

Q. But from your knowledge of standard works on this, what is the basis of your opinion that there is a hemorrhage of the brain?

A. Well, in this case it was from trauma."

By Mr. Wickersham:

"Q. Can you tell the jury why you think that?

A. Well, I would say on account of the history she gave me.

Mr. Marley: Well, I object to that, it is incompetent.

The Court: Let's not go into that.

Mr. Marley: Move to strike out that answer because it was on account of the history she gave him.

The Court: Motion overruled.

[fol. 40] (To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

Fourteenth. The Court committed error in admitting over the objections and exceptions of defendant New York Central Railroad Company the answer of the witness, Dr. W. J. Connor to the question as follows:

By Mr. Wickersham:

"Q. Now, Doctor, what have you to say, knowing the condition this woman was in when you treated her in October and November, 1925, and seeing her condition within a few weeks ago, as to what is your opinion as to the permanency of this condition.

Mr. Marley: Object, incompetent, don't think the witness has shown himself qualified as an expert to give an opinion on that.

The Court: Objection overruled.

(To which action and ruling of the Court of the New York Central Railroad Company then and there duly excepted and still except.)"

A. She won't ever be well.

Fifteenth. The Court committed error in admitting, over the objections and exceptions of the defendant, New York Central Railroad Company, the answer that Myrtle Johnson told him a Wasserman test was negative, of the witness Dr. Edward Geraughty, to the question as follows:

By Mr. Wickersham:

"Q. Before you actually began to administer to her, did you obtain any history of any blood tests that she had previously had?

A. I went into the history of the case thoroughly, of course, into all the history of her injury, history of anything; her personal history was taken into consideration, yes sir.

Q. And were you advised as to whether or not she had had a Wasserman test?

A. Yes, sir.

Mr. Marley: Object to that, your Honor, as incompetent and hearsay.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there excepted and still except.)

[fol. 41] By Mr. Wickersham: "Do you remember whether the test was negative or positive?

A. Yes, sir.

Q. What was it?

A. Showed negative.

Mr. Marley: I move to strike that out as incompetent and hearsay.

Mr. Wickersham: Did you learn it from the plaintiff?

A. Yes.

The Court: I don't see where it makes any difference whether he learned it from the plaintiff or not. I think it is competent. Go ahead.

(To which action and ruling of the Coupрt the New York Central Railroad *Railroad* Company then and there duly excepted and still except.)"

Sixteenth. The Court committed error in admitting over the objections and exceptions of the New York Central Railroad Company, the answer of the witness, Dr. Edward Geraughty, to the queston as follows:

"Q. Now, Doctor, may a blow, violence upon the left side of the head, be sufficient to cause a hemiplegia such as you found?

A. Yes, sir.

Mr. Marley: Object to that as incompetent, not based upon sufficient facts and calling for an opinion without the hypothetical facts upon which to base it, and I object to it as incompetent.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

Seventeenth. The Court committed error in admitting over the objections and exceptions of defendant, New York Central Railroad Company, the answer of the witness, Imogene Johnson, as to the extraordinary jerk, lurch, lunge and jolt of car, the question as follows:

"By Mr. Chilcott:

"Q. Mrs. Johnson, I wish you would tell the Court and Jury what experience, if any, you have had in riding on passenger trains?

A. I came from South Dakota to Kansas City when I was a youngster. I have been out to Glacier National Park once; I have been out west twice prior to this time.

[fol. 42] Q. How far west?

A. To San Francisco, Salt Lake City and I have been to Chicago and Michigan twice before, I have been to Canada and up East once before.

Q. State whether or not you had ever been to New York prior to that time?

A. Yes, I had been to New York, when I went to Canada with a trip the year before.

Q. Had you ever ridden on the New York Central prior to this time?

A. Yes, sir.

Q. Now, Mrs. Johnson, are you familiar with the usual and ordinary jerks, jolts and lurches of passenger trains?

A. Yes, sir.

Q. I want you to tell whether or not in your opinion those jerks and jolts which you have described are usual and ordinary or unusual and extraordinary?

Mr. Marley: I object, because you have got to take into consideration the train, the track, the curves and grades and speed, and in order to testify to that, she should have to show she had traveled at the same rate and on the same kind of road and with the same number of curves and same conditions; those things are all governed by the grade and curve and road and speed.

The Court: I understand the rule is that a person who has had such experience in traveling on railroad trains, may express an opinion as to whether a given lurch or jerk was or was not usual or unusual, but that testimony is for the

jury who are the judges of the weight of the testimony, to consider, together with the other testimony; and in view of the testimony of this witness as to her experience in traveling many thousands of miles, the objection is overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still excepts.)

Q. What is your answer?

A. My answer is, that this was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced.

Mr. Marley: Move to strike that out as incompetent.

The Court: The Objection overruled.

(To which ruling of the Court the New York Central Railroad then and there duly excepted and still excepts.)"

[fol. 43] Eighteenth: The Court committed error in admitting over the objections and exceptions of the New York Central Railroad Company the answer of the witness Myrtle Johnson as to the jerk, lunge and jolt of the car being unusual and extraordinary to the question as follows, to-wit:

"Q. Now, what experience have you had in traveling in passenger trains in recent years, before this accident?

A. Well, I have been to New York twice, and I have been to San Francisco and Canada, and to Washington, and St. Paul, and Minneapolis, and Oregon, and Oklahoma, St. Louis, Chicago.

Q. Had you ridden over the New York Central prior to this time?

A. I have.

Q. Are you familiar with the usual and ordinary jerks of a pas-enger train, and lurches?

A. I am.

Q. I want you to state whether or not this jerk and lurch and jolt of which you have testified was a usual and ordinary, or unusual and extraordinary?

A. It was unusual.

Mr. Marley: Wait a minute. Wait a minute. That is objected to as an incompetent because she hasn't shown that she has had experience under similar conditions, and

she hasn't qualified to testify as an expert as to the conditions under which this happened.

The Court: Well, on these various trips of yours, Mrs. Johnson, you were traveling on passenger train, weren't you?

A. Yes, sir.

The Court: Objection overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still excepts.)

By Mr. Chilcott:

Q. Just answer the question.

A. Very unusual and very, very extraordinary.

Nineteenth. The court committed error in refusing to give at the close of the plaintiff's case the following peremptory instruction for and on behalf of the defendant New York Central Railroad Company, to-wit:

"The Court instructs the jury that under the pleadings and the evidence the plaintiff Edward H. Johnson cannot recover in his action and your verdict must be for the defendant New York Central Railroad Company."

[fol. 44] (To which action and ruling of the court in refusing said instruction the defendant New York Central Railroad company then and there duly excepted at the time and still excepts.)

Twentieth. The court committed error in refusing to give, at the close of all the evidence the following peremptory instruction for and on behalf of the defendant New York Central Railroad Company, to-wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Edward H. Johnson cannot recover in his action and your verdict must be for the defendant New York Central Railroad Company."

(To which action and ruling of the court in refusing said instruction the defendant New York Central Railroad Company then and there duly excepted and still excepts.)

Twenty-first. The court committed error, over the objections and exceptions of the New York Central Railroad Company in permitting the plaintiff's attorney Chilcott to address the jury as follows in the argument of the case:

"But, Gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.

Mr. Marley: I object to that, Your Honor. There is no evidence of that at all. It *is* isn't proper argument.

The Court: The objection is overruled, in view of the examination of the witnesses and of the testimony in the case."

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still except.)

Twenty-second. The Court committed error in permitting, over the objection and exception of the New York Central Railroad Company, the plaintiff's attorney Chilcott to further address the jury as follows, to-wit:

"Mr. Chilcott: Gentlemen of the Jury, they would charge her with a disease which would brand her as bad as a leper, and exclude her from the society of decent people. That is the kind of defense that is in this case, and I resent it. I resent the New York Central coming into this town and [fol. 45] saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.

Mr. Marley: Our objection continues to this line of argument.

The Court: Yes, that will be understood.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts).

Twenty-third. The court committed error in permitting, over the objections and exceptions of the New York Central Railroad Company, the plaintiff's attorney, Mr. Wickersham, to address the jury as follows:

"I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him, and I know the obstacles that confront

him as local counsel for an eastern railroad, the defense in a case of which is prepared by a claim department and handed to him to try. It is especially hard for him because he knows those two young women, and as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he is required to follow the dictates of some claim department.

Mr. Marley: That I object to, your Honor, as incompetent argument. No evidence of my following any dictates of any claim department.

Mr. Wickersham: It is obvious.

The Court: Counsel may draw inferences from facts as he sees them.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts.)"

Twenty-fourth. The court committed error in permitting, over the objections and exceptions of the New York Central Railroad Company, the plaintiff's attorney Mr. Wickersham, to address the jury as follows:

"You mean to tell me when a man who knows all about arachnoids and pia mater and dura mater and all about those things that he hadn't prepared this defense and worked out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me [fol. 46] that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Doctor Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

"Oh, I have been too long in this business of trying lawsuits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman——

Mr. Marley: If your Honor please, there is no evidence of that kind, of any attempt on our part——

Mr. Wickersham: I say there is.

Mr. Marley: —to charge her with indecency, and I take exception to the argument of counsel along these lines.

The Court: The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts.)"

Twenty-fifth. The court committed error in charging the jury over the objections and exceptions of the New York Central Railroad Company as follows:

"Gentlemen of the jury, the court instructs you that if you find and believe from a preponderance or greater weight of the credible testimony in this case that the plaintiff's wife was a passenger upon one of the defendant's trains in the State of New York at the time and place mentioned in the evidence, that she had paid for her transportation, and that while she was riding as such passenger upon one of the defendant's trains she was injured and that her injury was directly caused by an unusual, extraordinary lurching, jerking, surging, movement of the train, and that such unusual, extraordinary lurching, jerking, surging, movement of the train, if any, was caused, directly [fol. 47] caused, by the negligence of the defendant, its agents and servants in charge of said train, or, to put it differently, by their failure to use that degree of care in the operation of the train that the law imposed upon them, and which I have already stated to you, then in that event, if you find all of these things which I have enumerated, it is your duty to return a verdict for the plaintiff."

(To which action and ruling of the court in so charging the jury, the defendant New York Central Railroad Company then and there excepted and still excepts.)

Twenty-sixth. The court erred, over the objections and exceptions of the New York Central Railroad Company, after giving defendant's instructions as follows:

"The court instructs the jury that the defendant New York Central Railroad Company, was not an insurer of the

safety of Myrtle J. Johnson as a passenger on one of its trains mentioned in the evidence, neither is it responsible to her for any injuries, if any she sustained, while standing in the aisle of the sleeper mentioned in the evidence; by the lurching of that car."

by modifying it as follows:

"That is provided, gentlemen—this I interpolate—it was not by any extraordinary and unusual lurching and jerking of the car, as I have elsewhere defined it and discussed it in my charge."

(To which action of the court in modifying said defendant's instruction, the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-seventh. The court committed error in charging the jury, over the objections and exceptions of the New York Central Railroad Company, as follows:

"The court instructs the jury that if you find and believe from the evidence that on or about the 27th day of September, 1925, plaintiff's wife boarded the car and train referred to in evidence, and that she paid to defendant her fare and became a passenger on said train and car, and that said train and car in which plaintiff was riding were being operated by defendant, then it became the duty of the defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely; and a failure, if any, on the defendant to use such highest degree of care would constitute negligence on its part and defendant would [fol. 48] be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any; and if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defense, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by the plaintiff were so occasioned by an inevitable

accident or by some cause which such highest degree of care could have avoided."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-eighth. The court erred, over the objections and exceptions of the New York Central Railroad Company, in charging the jury as to the measure of damages, as follows, to-wit:

"The court instructs the jury that plaintiff Edward H. Johnson is entitled to the society, health, strength and usefulness of his wife, Myrtle J. Johnson, unimpaired by injury as the result of the negligence, if any of the defendant, and that the law does not furnish us any exact standard by which to measure the value of plaintiff's said wife's society; you are, therefore, instructed that if your verdict is for the plaintiff Edward H. Johnson then in estimating and determining his damages, if any, the jury will take into consideration the nature and extent of the injuries, if any, sustained by plaintiff's said wife, Myrtle J. Johnson, which you find and believe from the evidence to be the direct result of the negligence of the defendant as submitted to you in other instructions herein; whether or not such injuries, if any, are permanent; any impairment, if any, of her ability to work and assist plaintiff; and you are further instructed that the value of the society, aid and affection of Mrs. Johnson to her husband, plaintiff herein, must be left to the enlightened judgment of the jury. By the term 'society' as is here used is meant the capacity for usefulness, aid and comfort as the wife possessed at the time of her injury, if any, and your entire award, if any, should be stated in one sum.

Mr. Marley: What number is that instruction?

[fol. 49] The Court: This is plaintiff's requested instruction No. 3. So if your verdict is for the plaintiff Edward H. Johnson, that will be the measure of the damages to be awarded to him. You cannot find for him unless you find from the testimony that at [—] time he was the husband of the plaintiff Myrtle J. Johnson, at the time of the alleged injury and now; that she was injured as a direct result of the negligence of the defendant, as I have previously de-

fined and gone into that matter and instructed you concerning that matter in her case, and that as a result of her injuries he suffered damages in the matters to which I have referred in the instruction numbered 3 which I have just read to you."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-ninth. The court committed error in charging the jury over the objections and exceptions of the New York Central Railroad Company, as follows:

"Then it became the duty of defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely, and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Thirtieth. The court committed error in charging the jury, over the objections and exceptions of the New York Central Railroad Company, as follows:

"And if you find and believe from the evidence that the car in which plaintiff's wife was riding, if you find and believe that she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defendant and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part [fol. 50] and that the injuries, if any, sustained by plaintiff were occasioned by an inevitable accident, or by some cause which such highest degree of care could not have avoided."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Thirty-first. The court erred in charging the jury, over the objections and exceptions of the New York Central Railroad Company as follows, to-wit:

"Subject to a modification which I shall presently state to you, the burden of proof is upon the plaintiff to prove his case by the preponderance or greater weight of the credible testimony in the case; and if he has failed to prove his case by the preponderance or greater weight of the credible testimony in the case the verdict of the jury must be for the defendant; and by the preponderance or greater weight of the credible testimony is not meant the greater number of witnesses, but that testimony that is the more convincing and satisfying to the minds of the jury. That is the general rule in all cases."

And then in making the following modification, to-wit:

"If the plaintiff in this case has proved that his wife was a passenger on the defendant's train at the time and place referred to in the testimony, that she had paid for her transportation, that she was injured while a passenger, that her injury was directly caused by an extraordinary and unusual lurching and jerking of the train or car upon which she was riding, then he does not need to go further and prove what specific negligence, if any, caused that unusual lurching and jerking of the train, because the law presumes that an unusual, extraordinary lurching and jerking of the train or car upon which the passenger was riding, was due to the negligence of the defendant, its agents and servants in charge of and operating the train; was due to the failure upon their part to exercise that degree of care which the law requires of a railroad company."

(To which action and ruling of the court in making said modification in the charge to the jury, the New York Central Railroad Company then and there excepted at the time and still excepts.)

[fol. 51] By reason whereof the said New York Central Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed, etc.

(Signed) A. S. Marley, W. Haley Reed, Attorneys for Plaintiff in Error, New York Central Railroad Company.

In United States District Court

No. 6300. In Law

Myrtle J. Johnson, Plaintiff,

vs.

New York Central Railroad Company, a Corporation, Defendant

Assignment of Errors

Now comes the New York Central Railroad Company, a corporation, plaintiff in error, by Marley & Reed, its attorneys and in connection with its petition for writ of error says that in the record, proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the plaintiff in error as follows, to-wit:

First. The court committed error in consolidating for trial together over the objections and exceptions of the New York Central Railroad Company, the case of Edward H. Johnson, Plaintiff, vs. New York Central Railroad Company, defendant, number 6,299, with the case of Myrtle J. Johnson, plaintiff, vs. New York Central Railroad, defendant, number 6,300.

Second. The Court committed error, over the objections and exceptions of the defendant New York Central Railroad Company in overruling the said Defendant's objection to the introduction of evidence in support of the Plaintiff's petition for the reason that the said petition did not state a cause of action against the defendant Railroad Company.

Third. The Court committed error in admitting, over the objections and exceptions of the defendant, New York Cen-

tral Railroad Company, the answer of the witness, Dr. St. Elmo Sanders, to the following hypothetical question, to-wit:

"Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train in the State of [fol. 52] New York, and between the hours of eleven and twelve at night, and was in a Pullman car, the train at the time going west, and she stood in the aisle holding on to a curtain with her right hand towards the rear portion of the berth, near the partition between it and the berth just back of it, and while standing in that position in the aisle, there was a sudden stopping, a lurch, a jerk of the train, and she was thrown around, to strike her head upon a portion of the upper berth, and then was caused to lose her hold upon the curtain and thrown to the floor—that was the left side of her head that was struck, and she was thrown to the floor; and in a very short space of time afterwards a companion with her came to her to pick her up, and she was holding her head and saying, 'Oh, my head, Oh, my head' and appeared dazed; and then they picked her up and put her on the side of the berth, and later took her to the women's dressing room at the end of the car and bathed her face, and later undressed her and put her to bed, and that it was some difficulty and a considerable length of time to get to sleep, perhaps more than an hour, and then the next day late in the morning towards noon that she awoke and her right side, arm and leg were cold, numb, clammy and she hadn't full power to control the motor nerves and the muscles of the arm and leg, and she then—and her face was drawn downward to the left and that she couldn't talk normally, but muttered; that with difficulty she could swallow, eat but little, and that she then arrived in Chicago that afternoon and was taken off the train, put in a wheel chair, and then from there taken to another station in Chicago and there put upon a train and brought to Kansas City, and then taken to your hospital; assuming those facts to be true, I will ask you if the conditions which you have testified to here, that you found her in when you made your examination and accorded her treatment in your opinion could be caused by such a blow and violence.

Mr. Marley: Wait a minute, I object to that, Your Honor, as including elements that are not proper elements to be considered in a hypothetical question. As I understand, the condition to which the testimony has been given would be dependent upon her physical condition; the condition of the head. These others are not elements indicative of the cause at all; and I contend that in order to put the proper hypothetical question, it would be necessary to include the condition of the woman, the blow on the head, and the effect, or the judgment as to the cause of the blow, and the effect of the blow upon the human brain; and I [fol. 53] are not proper elements to include in a hypothetical question to show the cause of the injury. We object to it as incompetent.

The Court: Overruled.

Mr. Marley: I desire to save an exception, Your Honor.

By Mr. Wickersham:

Q. I want to add to that question these further facts: That you may assume to be true; that she was a woman who weighed in the neighborhood of one hundred fifty to one hundred sixty pounds; that she was about thirty-one years of age; married; that for several years she had been a hair dresser in business here in Kansas City; that she had not had any ailments from the time that she was a little child, the cutting of teeth; that within the month prior to this accident and injury that I have mentioned she went on a train from Kansas City to Los Angeles, California and from there by boat to San Francisco, attending a Convention, and went to Sacramento and various side trips, and from there up to Victoria, Canada, and to Banff and from there to St. Paul and Chicago; to New York, where she was for several days looking after hair dressing appliances and during that time was in normal health; and went from New York the day before this happening to Nyack, New York, some forty-odd miles north of New York City, and remained there for a day and a half, and walked about and appeared normal and enjoying ordinary health.

Now, assuming all the facts which I have given you in the original and supplemented question, I will ask you if in your opinion the blow and violence, such blow and violence

as I have indicated in the question, could cause the result to which you have testified.

Mr. Marley: We desire to object to the question for the reasons given to the other question, and for the further reason that it is assuming facts that are not in evidence.

The Court: One of them, at least is not in evidence; that was that she had been in good health from childhood.

Mr. Wickersham: Withdraw that portion of the question, Doctor, if there is any question about that; and if there are any other facts that counsel thinks I have not included in the question I ask him now to indicate them.

Mr. Marley: My contention is, and I will indicate this; that in order to determine her condition, he would have to take into consideration the nature and extent of this blow, and to further show that it could not have been caused in any [fol. 54] other manner; could not be reasonably apprehended to have been caused in any other manner, and that is entirely omitted in this case. In other words, to make my point clear, the evidence might indicate, by his examination and from his knowledge of it, that—and from the treatment he was giving of iodide of potassium—that there was another cause or condition in there that should be taken into consideration.

The Court: Objection overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still excepts.)

By Mr. Wickersham:

Q. You may answer.

A. I would say that the condition such as I found might have been caused by such a blow as she had on her head."

Fourth. The court erred in admitting, over the objections and exceptions of defendant, New York Central Railroad Company, the following Answer As To What He Found on left side of skull by the witness, Dr. Walter C. Chaney:

"Q. So I understand you take the left and right side of the skull, these pictures, and put them some distance apart,

and by looking into mirrors with electric lights you use, you get a rounded view of the skull?

A. Take two pictures of the left side and put them together and it gives us a rounding view, so that we are looking into the skull.

Q. Now, did you do that with these pictures I have offered in evidence?

A. Yes, sir.

Q. Did you read them?

A. Yes, sir.

Q. Please tell the Jury what you found, if anything, upon the left side of the skull?

Mr. Marley: We object to that because it embodies something that is not here. Now if he will bring this machine here, so that we will have a chance to verify his reading, well and good, but these other experts that have been called in, nothing has been said about this kind of a 'scope' and we object, incompetent and doesn't give us the proper opportunity to test out his testimony in that regard.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

[fol. 55] By Mr. Wickersham:

Q. Go on and tell us, Doctor.

A. On the left side of the skull in this case there is a building up process in the region of the anterior part of the region on the side of the head, the parietal bone back of the juncture of the frontal bone and well up towards the curve on the top of the head, there is a lack of shadow due to the thickening there, thickened condition."

Fifth. The court committed error in admitting, over the objections and exceptions of Defendant, New York Central Railroad Company, the answer of the witness, Dr. Walter C. Chaney, to the following question, to-wit:

"Q. Now, in order to carry out the idea of the Judge, is there any thickness there sufficient in your opinion to cause any effect on the motor nerves of the brain?

Mr. Marley: Object, because we don't know and he don't know what the thickness is, and until he does, he could hardly know what the effect would be.

The Court: He can answer that question. Read the question.

(Question read as above recorded.)

A. Yes, sir."

Sixth. The Court committed — in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney, to the following question, to-wit:

"Q. Doctor, would violence applied to the left side of the skull at the point where you indicated there is a thickening, in your opinion cause or might cause a paralysis of the right side of the body?

Mr. Marley: Objection, incompetent, and too broad in its scope.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. Yes, sir."

Seventh. The Court committed error in admitting, over the objections and exceptions of the defendant, New York Central Railroad Company, the answer, as to thickening of [fol. 56] skull to the following question, by the witness Dr. Walter C. Chaney, to-wit:

"Q. That length of time had elapsed. Will you explain to the jury how it comes about that you can have a thickening as shown in those pictures such as you have testified to in February, 1927, that isn't shown in the picture of September, 1925?

Mr. Marley: Object, incompetent. The witness has not shown himself familiar with the situation and facts upon which to base an opinion, and it would be merely conjecture as far as he is concerned.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. I will have to answer that from the things that usually take place following an injury to the head such as she was supposed to have had here. A slight hemorrhage under the periosteum of the skull on that side would become organized and form a slight bony plate on the inner side of the skull; or the injury may have been to the covering of the skull—covering of the brain I mean, in which you get a thickened hardening of the dura mater of the brain.

Mr. Marley: I object to that. There is no evidence here of the thickening of the dura mater of the brain, but to the pia mater of the brain, on the inside and not the outside.

Mr. Wickersham: I know, but who says so.

Mr. Marley: I take it the witness is undertaking to testify with reference to the things that you have been developing in evidence in this case, and not roaming over the realm of speculation to base his opinion.

The Court: I understand he is trying to explain the difference between these two pictures, showing the difference on these two different dates.

Mr. Marley: Now, in undertaking to explain that difference, he goes beyond and gives a reason other than that indicated by the testimony in this case.

The Court: According to the Court's opinion his answer is in the realm of propriety under the law and evidence, and the objection is overruled.

[fol. 57] (To which action and ruling of the Court the New York Central Railroad Company duly excepted at the time and still except.)

Mr. Wickersham: Go on, Doctor.

A. In either case, the thickening, the x-ray picture would show on the side of the skull as if it was fastened direct to the skull, whether it was on the inner side of the skull, a thickening up of the bony structure due to hemorrhage or whether due to a lick causing the membrane to come back and hit the skull, or thickening of the dura mater, either would make a thickened tissue for the light to go through, and consequently there wouldn't be a shadow produced.

Eighth. The Court committed error in admitting over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney to the question, as follows, to-wit:

"Q. Now, Doctor, does it take any appreciable period of time for this thickening to take place and grow there? In other words, may you have a blow received upon the left side of the head at the point we have in mind, on the 27th day of September, 1925, and cause some lesion to the dura mater or pia mater, of the tissue of the brain, with a resultant hemorrhage and a thickening of the part that is injured by this lesion, not taking place for some time, some period of time afterwards, after the reception of the blow?

Mr. Marley: That is objected to as incompetent, and omitting matters that ought to be included in the question. This witness, as I understand it, has not shown himself familiar with the condition of this patient excepting to the extent of having taken an x-ray of the skull, and along the line of testimony that they are trying to bring out now, if he had examined the witness and was familiar with it, or he would take the history of the case, then he might be in a position to express the opinion that they are asking him now, but I don't believe he is in a position now to answer that question, as a competent expert, and object to it for that reason.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

A. It would take some time for the organization of the clot to form a new tissue, which would cause a thickening.

[fol. 58] Mr. Marley: Move to strike that out as incompetent, too broad in its scope and too indefinite.

The Court: Motion overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

Ninth. The Court committed error in admitting, over the objections and exceptions of the New York Central R. R. Co. the answer, as to clot of scar tissue or lesions in brain,

of the witness Dr. Walter C. Chaney to the following question, to-wit:

By Mr. Wickersham:

Q. Have you taken pictures of patients with skull injuries at various periods of time after reception of the injury?

A. Yes, sir.

Q. Have you noted in your long experience of twenty-one years that there may be a clot of scar tissue lesions in the brain?

A. Yes, sir.

Mr. Marley: Object to that as incompetent because in order to make those things competent, there should be a similarity of situation. I don't believe he can go and speculate as to any kind of injury. I don't understand he is trying to qualify the man. What he is trying to do is to get the opinion of a man on a situation that is here before the jury and yet is asking him questions on a situation that is not similar at all, and I object to it for that reason as incompetent.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

By Mr. Wickersham:

Q. You may answer.

A. Yes, sir.

Tenth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Walter C. Chaney to the question as follows to-wit:

"By Mr. Wickersham:

Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train and standing in [fol. 59] the aisle of a pullman, holding on to a curtain of a berth, and there was a sudden lurch of the train which threw her around forward as the train was going so as to strike her head against the upper berth, and she was

thrown to the floor, and that she was dazed at the time crying 'Oh my head, Oh my head' and then later, or something perhaps an hour or two afterwards, she was put to bed and went to sleep, and this occurred between eleven and twelve o'clock at night, and next morning, shortly before noon, when she was awakened, that there was a partial paralysis of the right leg and side and arm and a twisting of her face, and an inability to speak plainly, and then she was brought from New York, where it happened, State of New York, to Kansas City, and out to the Grace Hospital, and these pictures were taken on the 29th day of September, as you have read them, and then her paralysis of the right side got some better so that she could use her right hand and arm and leg somewhat better, and her speech improved some, and then you took these pictures of her on the 16th day of this month, and that there is a thickened area which appears in the picture that you took a few days ago, and does not appear in the pictures that were taken on the 29th of September, 1925. Is that any indication to you as a professional man of the growth of any scar tissue in the covering of the brain?

Mr. Marley: Object to that as incompetent and including elements that I don't think ought to be in the question, and I object to it for that reason.

The Court: Overruled.

(To which ruling and action of the court the New York Central Railroad Company duly excepted at the time and still except.)

By Mr. Wickersham:

"Q. What is your answer?

A. Yes, sir.

Eleventh. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Walter C. Chaney, to the following question, as follows, to-wit:

"Q. Now, Doctor, I will ask you, if in your opinion, this thickening there, which you have described, could in your opinion be caused by the blow and violence indicated in my last question?

[fol. 60] Mr. Marley: Object to the question for the same reasons heretofore given for previous questions similar to this.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. I would think so.

Twelfth. The Court committed error in admitting, over the objections and exceptions of the Defendant, New York Central Railroad Company, the answer of the witness Dr. W. J. Connor, as to blow or injury being sufficient to cause Myrtle Johnson's condition, to the question as follows, to-wit:

"Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was in a normal condition of health, has been on a trip from Kansas City to Los Angeles and San Francisco, Victoria, Vancouver, St. Paul, Chicago to New York, attending to business, convention, and to purchase certain appliances for hair dressing, and walked about actively and freely, and on the night of September 27th, 1925, she was riding in a train going from New York to Chicago, somewhere between eleven and twelve o'clock at night, while in a Pullman, standing in the aisle adjacent to her berth and holding with her right hand to the curtains near the partition of the next berth behind it, facing in a general direction the way the train was going, and that there was a sudden lurch of the train, and that she was thrown forward and around and struck the left side of her head against the upper berth and was thrown to the floor, and that she was in a dazed condition and crying, 'Oh my head, Oh my head,' and that she was then picked up and put on the edge of the berth a little while and then taken back to the lady's dressing room, and in a short while water was put upon her face, and she was undressed and put night clothes on, and taken back to her berth, and in an hour or so got to sleep, and next morning late, or about noon when she awakened, the right side was paralyzed, unable to move the right arm and leg, and it was cold and clammy and that her face was drawn down on the right and inability to talk

plainly, and she left the train in Chicago in the afternoon, taken off the train and put in a wheel chair and later put on another train and brought to Kansas City to the Grace Hospital and remained there for some nine or ten days, and during that time she was paralyzed as I have indicated, [fol. 61] and there was some improvement in the use of her right side and improvement in her speech to some extent, and that she was released from there and went to her home and then was in the condition you have described. I will ask you sir, if in your opinion as a physician, the blow and violence which I have indicated in this question in your opinion was sufficient to cause this result which I have indicated?

Mr. Marley: We object, incompetent. He hasn't shown himself qualified to answer questions in reference to nervous diseases and brain diseases. As I understand he is an Osteopath, and as I understand, he is dealing with the bone situation, rather than the nerves and blood vessels and tissues of the body and brain, and in addition to that, it involves improper elements.

Mr. Wickersham: Will you indicate what it is.

Mr. Marley: My contention is that the detail of being carried in a chair and all these other minor matters are not elements to be included in the determination of whether or not her condition was caused by a blow.

The Court: Doctor, keep this question in your mind, so that it won't be necessary to repeat it.

By Mr. Wickersham:

Q. Now, Doctor, there is some question raised as to the qualifications you have to answer that question. I want you to tell the Court and Jury what experience you have had with head injuries and patients who are paralyzed partly so, hemi plegia and the like.

Mr. Marley: I object to that, people can have hemi plegia and all, different strokes of paralysis without being affected with injury at all.

Mr. Wickersham: I want to get his experience.

The Court: Show first his qualification and then his experience.

By Mr. Wickersham:

Q. Tell us what school you are a graduate of.

A. I am a graduate of the American School of Osteopathy at Kirksville.

Q. And in that school, are you required in your course of study to make a full and exhaustive study of the nerves and bones and muscles and other parts of the body?

Mr. Marley: Object.

The Court: Objection overruled.

[fol. 62] (To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. Yes, sir; we study any part of the body just as thoroughly as in any medical school in the world.

Q. And did you do so?

A. Yes, sir.

Q. And graduated?

A. Yes, sir.

Q. Now, what has been your experience in the treating of traumatism, traumatic cases?

A. They are very rare; not seen many traumatic cases. I have seen plenty of older people, but it is unusual, a traumatic injury of that kind is not usual.

Q. But that does happen?

A. It does happen.

Q. Now, what experience, now, have you had to enable you to determine the cause and effect of paralytic conditions?

Mr. Marley: I think, your Honor, it is about traumatic conditions. It isn't a question of any other condition, but a question of traumatic condition.

The Court: Limit the condition to a paralytic condition from a traumatic cause.

By Mr. Wickersham:

Q. What experience have you had?

A. I have seen a number of cases.

The Court: Your experience in this connection includes not only the personal cases you have had, but experience of others gained by reading, etc.

By Mr. Wickersham:

Q. In your knowledge and reading and study of text books,—have you done that?

A. Yes, sir.

Q. Are you familiar with the standard works upon anatomy?

A. Yes, sir.

Q. And nervous disorders?

A. Yes.

Q. And books that cover the subject of paralysis?

A. Yes, sir.

Q. And head injuries?

A. Yes, sir.

Q. And you are familiar with the standard works on what is ecology and works on those questions?

The Court: You may answer the hypothetical question.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

[fol. 63] By Mr. Wickersham:

Q. Assuming all these facts I gave you in the hypothetical question to be true, I will ask you in your opinion whether the blow and injury indicated in that question might be sufficient to cause the condition which you have testified to here?

Mr. Marley: Renew my objection, so as to keep the record straight.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)

A. Yes, sir; it would."

Thirteenth. The Court committed error in admitting, over the objections and exceptions of the defendant, New York Central Railroad Company, the answer of the witness, Dr. W. J. Connor, that Myrtle Johnson's condition was due to trauma, to the following question, to-wit:

"Q. Now, is there anything in the way she walks, the way she picks up and uses this right leg, that indicates to you whether that condition is due to traumatism or due to any disease?

Mr. Marley: Object to that, it is incompetent. He hasn't shown he is familiar with diseases of the kind I think he is alluding to. I don't believe that the witness has shown himself qualified to answer the question.

The Court: Objection overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still except.)

A. I get my information wholly from books as I never held a post mortem on a case of that kind.

Q. But from your knowledge of standard works on this, what is the basis of your opinion that there is a hemorrhage of the brain?

A. Well, in this case it was from the trauma."

By Mr. Wickersham:

"Q. Can you tell the jury why you think that?

A. Well, I would say on account of the history she gave me.

Mr. Marley: Well, I object to that; it is incompetent.

[fol. 64] The Court: Let's not go into that.

Mr. Marley: Move to strike out that answer, because it was on account of the history she gave him.

The Court: Motion overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still except.)"

Fourteenth. The Court committed error in admitting over objections and exceptions of defendant, New York Central Railroad Company, the answer of the witness Dr. J. W. Connor, to the question as follows:

By Mr. Wickersham:

"Q. Now, Doctor, what have you to say, knowing the condition *of* this woman was in when you treated her in

October and November, 1925, and seeing her condition within a few weeks ago, as to what is your opinion as to the permanency of this condition.

Mr. Marley: Object, incompetent, don't think the witness has shown himself qualified as an expert to give an opinion on that.

The Court: Objection overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

A. She won't ever be well.

Fifteenth. The court committed error in admitting, over the objections and exceptions of the defendant New York Central Railroad Company, the answer that Myrtle Johnson told him a Wasserman test was negative of the witness Dr. Edward Geraughty, to the question as follows:

By Mr. Wickersham:

"Q. Before you actually began to administer to her, did you obtain any history of her of any blood tests that she had previously had?

A. I went into the history of the case thoroughly, of course, into all the history of her injury, history of anything; her personal history was taken into consideration, yes, sir.

Q. And were you advised as to whether or not she had had a Wassermann test?

A. Yes, sir.

[fol. 65] Mr. Marley: Object to it, your Honor, as incompetent and hearsay.

The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there excepted and still except.)

By Mr. Wickersham:

Q. Do you remember whether the test showed it was negative or positive?

A. Yes, sir.

Q. What was it?
A. Showed negative.

Mr. Marley: I move to strike that out as incompetent and hearsay.
Mr. Wickersham: Did you learn it from the Plaintiff?

A. Yes.

The Court: I don't see where it makes any difference whether he learned it from the plaintiff or not. I think it is competent. Go ahead.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

Sixteenth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Dr. Edward Geraughty to the question as follows:

"Q. Now, Doctor, may a blow, violence upon the left side of the head, be sufficient to cause a hemiplegia such as you found?
A. Yes, sir.

Mr. Marley: Object to that as incompetent, not based upon sufficient facts and calling for an opinion without the hypothetical facts upon which to base it, and I object to it as incompetent.
The Court: Overruled.

(To which action and ruling of the Court the New York Central Railroad Company then and there duly excepted and still except.)"

Seventeenth. The Court committed error in admitting, over the objections and exceptions of defendant, New York [fol. 66] Central Railroad Company, the answer of the witness Imogene Johnson, as to the extraordinary jerk, lurch, lunge and jolt of car, the question as follows:

By Mr. Chilcott:

"Q. Mrs. Johnson, I wish you would tell the Court and Jury, what experience, if any, you have had in riding on passenger trains?

A. I came from South Dakota to Kansas City when I was a youngster. I have been out to Glacier National Park once; I have been out west twice prior to this time.

Q. How far west?

A. To San Francisco, Salt Lake City and I have been to Chicago and Michigan twice before, I have been to Canada and up East once before.

Q. State whether or not you had ever been to New York prior to that time?

A. Yes, I had been to New York, when I went to Canada *with* a trip the year before.

Q. Had you ever ridden on the New York Central prior to this time?

A. Yes, sir.

Q. Now, Mrs. Johnson, are you familiar with the usual and ordinary jerks, jolts and lurches of passenger trains?

A. Yes, sir.

Q. I want you to tell whether or not in your opinion those jerks and jolts which you have described are usual and ordinary or unusual and extraordinary?

Mr. Marley: I object, because you have got to take into consideration the train, the track, the curves and grades and speed, and in order to testify to that, she should have to show she had traveled at the same rate and on the same kind of road and with the same number of curves and same conditions; those things are all governed by the grade and curve and road and speed.

The Court: I understand the rule is that a person who has had such experience in traveling on railroad trains, may express an opinion as to whether a given lurch or jerk was or was not usual or unusual, but that testimony is for the jury who are the judges of the weight of the testimony, to consider together with the other testimony; and in view of the testimony of this witness as to her experience in traveling many thousands of miles, the objection is overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still excepts.)

[fol. 67] Q. What is your answer?

A. My answer is, that this was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced.

Mr. Marley: Move to strike that out as incompetent.

The Court: Objection overruled.

(To which ruling of the Court the New York Central Railroad then and there excepted and still excepts.)

Eighteenth. The Court committed error in admitting, over the objections and exceptions of the New York Central Railroad Company, the answer of the witness Myrtle Johnson as to jerk, lunge and jolt of the car being unusual and extraordinary, to the question as follows, to-wit:

"Q. Now what experience have you had in traveling in passenger trains in recent years, before this accident?

A. Well, I have been to New York twice, and I have been to San Francisco and Canada, and to Washington, and St. Paul, and Minneapolis, and Oregon, and Oklahoma, St. Louis, Chicago.

Q. Had you ridden over the New York Central prior to this time?

A. I have.

Q. Are you familiar with the usual and ordinary jerks of a passenger train, and lurches?

A. I am.

Q. I want you to state whether or not this jerk and lurch and jolt of which you have testified was *a* usual and ordinary, or unusual and extraordinary?

A. It was unusual.

Mr. Marley. Wait a minute. Wait a minute. That is objected to as *an* incompetent because she hasn't shown that she has had experience under similar conditions, and she hasn't qualified to testify as an expert as to the conditions under which this happened.

The Court: Well, on these various trips of yours, Mrs. Johnson, you were traveling on passenger trains, weren't you?

A. Yes, sir.

The Court: Objection overruled.

(To which action and ruling of the court the New York Central Railroad Company then and there duly excepted and still excepts.)

Mr. Chilcott: Just answer the question.

A. Very unusual and very, very extraordinary.

[fol. 68] Nineteenth. The court committed error in refusing to give at the close of the plaintiff's case the following peremptory instruction for and on behalf of the defendant, New York Central Railroad Company, to-wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Myrtle J. Johnson cannot recover in her action and your verdict must be for the defendant New York Central Railroad Company."

(To which action and ruling of the court in refusing said instruction the defendant New York Central Railroad Company then and there duly excepted and still excepts.)

Twentieth. The court committed error in refusing to give, at the close of all the evidence the following peremptory instruction for and on behalf of the defendant, New York Central Railroad Company, to-wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Myrtle J. Johnson cannot recover in her action and your verdict must be for the defendant, New York Central Railroad Company."

(To which action and ruling of the court in refusing said instruction the defendant New York Central Railroad Company then and there duly excepted and still excepts.)

Twenty-first. The court committed error, over the objections and exceptions of the New York — Railroad Company in permitting the plaintiff's attorney Chilcott to address the jury as follows in the argument of this case:

"But, Gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.

Mr. Marley: I object to that, your Honor. There is no evidence of that at all. It isn't proper argument.

The Court: The objection is overruled, in view of the examination of the witnesses and of the testimony in the case.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts.)"

Twenty-second. The court committed error in permitting, over the objection and exception of the New York Central Railroad Company, the plaintiff's attorney Chilcott to further address the jury as follows, to-wit:

[fol. 69] "Mr. Chilcott: Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper, and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.

Mr. Marley: Our objection continues to this line of argument.

The Court: Yes, that will be understood.

(To which action and ruling of the court the New York Central Railroad then and there excepted and still excepts.)"

Twenty-third. The court committed error in permitting, over the objections and exceptions of the New York Central Railroad Company, the plaintiff's attorney, Mr. Wickersham, to address the jury as follows:

"I cannot but feel a sense of sympathy for my poor friend, Mr. Marley. I say that in all sincerity and kindness, because I know him, and I know the obstacles that confront him as local counsel for an eastern railroad, the defense in a case of which is prepared by a claim department and handed to him to try. It is especially hard for him because he knows these two young women, and as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he is required to follow the dictates of some claim department.

Mr. Marley: That I object to, your Honor, as incompetent argument. No evidence of my following any dictates of any claim department.

Mr. Wickersham: It is obvious.

The Court: Counsel may draw inferences from facts as he sees them.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts.)"

Twenty-fourth. The court committed error in permitting, over the objections and exceptions of the New York Central Railroad Company, the plaintiff's attorney, Mr. Wickersham, to address the jury as follows:

"You mean to tell me when a man who knows all about arachnoids and pia mater and dura mater and all about [fol. 70] those things, that he hadn't prepared this defense and worked out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Doctor Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

"Oh, I have been too long in this business of trying lawsuits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman——

Mr. Marley: If your Honor please, there is no evidence of that kind, of any attempt on our part——

Mr. Wickersham: I say there is.

Mr. Marley: —to charge her with indecency, and I take exception to the argument of counsel along those lines.

The Court: The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn.

(To which action and ruling of the court the New York Central Railroad Company then and there excepted and still excepts.)"

Twenty-fifth. The court committed error in charging the jury over the objections and exceptions of the New York Central Railroad Company, as follows:

"Gentlemen of the jury, the court instructs you that if you find and believe from a preponderance or greater weight of the credible testimony in this case that the plaintiff was a passenger upon one of the defendant's trains in the State of New York at the time and place mentioned in the evidence, that she had paid for her transportation, and that while she was riding as such passenger upon one of the defendant's trains she was injured and that her injury was directly caused by an unusual, extraordinary lurching, jerking, surging movement of the train, and that such unusual, extraordinary surging, lurching, jerking movement of the train, if any, was caused, directly caused by the [fol. 71] negligence of the defendant, its agents, and servants in charge of said train, or, to put it differently, by their failure to use that degree of care in the operation of the train that the law imposed upon them, and which I have already stated to you, then in that event, if you find all of these things which I have enumerated, it is your duty to return a verdict for the plaintiff."

(To which action and ruling of the court in so charging the jury, the defendant New York Central Railroad Company then and there excepted and still excepts.)

Twenty-sixth. The court erred, over the objections and exceptions of the New York Central Railroad Company, after giving defendant's instruction as follows:

"The Court instructs the jury that the defendant, New York Central Railroad Company, was not an insurer of the safety of Myrtle J. Johnson as a passenger on one of its trains mentioned in the evidence, neither is it responsible to her for any injuries, if any she sustained, while standing in the aisle of the sleeper mentioned in the evidence; by the lurching of that car."

by modifying it as follows:

"That is provided, gentlemen—this I interpolate—it was not by any extraordinary and unusual lurching and jerking

of the car, as I have elsewhere defined it and discussed it in my charge."

(To which action of the court in modifying said defendant's instruction, the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-seventh: The court committed error in charging the jury, over the objections and exceptions of the New York Central Railroad Company, as follows:

"The court instructs the jury that if you find and believe from the evidence that on or about the 27th day of September, 1925, plaintiff boarded the car and train referred to in evidence, and that she paid to defendant her fare and became a passenger on said train and car, and that said train and car in which plaintiff was riding were being operated by defendant, then it became the duty of the defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely; and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if [fol. 72] you so find, from such negligence, if any; and if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defense, and the burden of proof is cast upon the defendant to rebutt this presumption of negligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by the plaintiff were so occasioned by an inevitable accident or by some cause which such highest degree of care could have avoided."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-eighth. The court erred, over the objections and exceptions of the New York Central Railroad Company,

in charging the jury as to the measure of damages, as follows, to-wit:

"Gentlemen of the jury, if your verdict is for the plaintiff, Myrtle J. Johnson, then of course it will be necessary for you to fix what damages you shall award her and for that the law provides a standard. If your verdict is for the plaintiff, in assessing her damages, you will take into consideration the nature and extent of her injuries, if any, received as a result of the negligence of the defendant, if any, pain and suffering, if any, which she has experienced as shown by the evidence by reason of said injuries, and which she will suffer hereafter as shown by the evidence by reason of said injuries, whether the injuries are permanent or not permanent, to what extent, if any, she has been deprived from earning an income by reason of the injuries, and to what extent, if any, as shown by the evidence, she will be in the future deprived from earning money at her usual or any other vocation, as shown by the evidence in the case; expenses, if any, to which she has been subjected or may be hereafter subjected, as shown by the evidence in the case, for medical attendance and assistance, but not to exceed the amount testified to in the evidence for that purpose, together with all the facts and circumstances in evidence relating to the injuries, if any, received by the plaintiff and directly caused by the negligence of the defendant, if any; and you will award her such damages as will reasonably compensate her for her injuries, if any, as shown by the evidence in the case, and as caused by the negligence of the defendant, if any, as shown by the evidence."

[fol. 73] (To which action of the court in so charging the jury, the New York Central Railroad Company then and there excepted and still excepts.)

Twenty-ninth. The court committed error in charging the jury over the objections and exceptions of the New York Central Railroad Company, as follows:

"Then it became the duty of defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in the same line of business to carry plaintiff safely, and a failure, if any, of the defendant to

use such highest degree of care would constitute negligence on its part and the defendant would be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted, and still excepts.)

Thirteenth. The court committed error in charging the jury, over the objections and exceptions of the New York Central Railroad Company, as follows:

"And if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defendant and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by plaintiff were occasioned by an inevitable accident, or by some cause which such highest degree of care could have avoided."

(To which action of the court in so charging the jury the New York Central Railroad Company then and there excepted and still excepts.)

Thirty-first. The court erred in charging the jury, over the objections and exceptions of the New York Central Railroad Company, as follows, to-wit:

"Subject to a modification which I shall presently state to you, the burden of proof is upon the plaintiff to prove her case by the preponderance or greater weight of the credible testimony in the case; and if she has failed to prove her case by the preponderance or greater weight of the credible testimony in the case the verdict of the jury must [fol. 74] be for the defendant; and by the preponderance or greater weight of the credible testimony is not meant the greater number of witnesses, but that testimony that is the more convincing and satisfying to the minds of the jury. That is the general rule in all cases."

And then in making the following modification, to-wit:

"If the plaintiff in this case has proved that she was a passenger on the defendant's train at the time and place referred to in the testimony, that she had paid for her transportation, that she was injured while a passenger, that her injury was directly caused by an extraordinary and unusual lurching and jerking of the train or car upon which she was riding, then she does not need to go further and prove that specific negligence, if any, caused that unusual lurching and jerking of the train, because the law presumed that an unusual, extraordinary lurching and jerking of the train or car upon which the passenger was riding was due to the negligence of the defendant, its agents and servants in charge of and operating the train; was due to the failure upon their part to exercise that degree of care which the law requires of a railroad company.

(To which action and ruling of the court in making said modification in the charge to the jury, the New York Central Railroad then and there excepted at the time and still excepts.)

By reason whereof the said New York Central Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed, etc.

(Signed) A. S. Marley, W. Haley Reed, Attorneys for Plaintiff in Error, New York Central Railroad Company.

In United States District Court

Order Allowing Writ of Error in Cause No. 6299—Filed April 11, 1927

On this 11 day of April, 1927, came the defendant, New York Central Railroad Company, a corporation, by its attorneys, and filed herein and presented to the Court, its petition, praying for the allowance of a writ of error; an assignment of errors intended to be urged by it; praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly au- [fol. 75] thenticated, may be sent to the United States Cir-

cuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant New York Central Railroad Company giving bond according to law in the sum of Twenty Thousand ($20,000.00) Dollars, which shall operate as a supersedeas bond.

Merrill E. Otis, Judge.

[File endorsement omitted.]

In United States District Court

Order Allowing Writ of Error in Cause No. 6300—Filed April 11, 1927

On this 11 day of April, 1927, came the defendant, New York Central Railroad Company, a corporation, by its attorneys, and filed herein and presented to the court, its petition, praying for the allowance of writ of error; an assignment of error intended to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant, New York Central Railroad Company giving bond according to law in the sum of Fifty Thousand ($50,000.00) Dollars which shall operate as a supersedeas bond.

Merrill E. Otis, Judge.

[File endorsement omitted.]

In United States District Court

Record Entry Citation Issued; Bond Filed and Approved in Cause No. 6299— April 11, 1927

Now on this day Citation is issued herein admonishing the plaintiff Edward H. Johnson to be and appear in the

United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri, sixty days from and after the date of this Citation, which Citation is returned with endorsement of service thereon, and defendant files its bond on appeal in the sum of $20,000.00, signed by New York Central Railroad Company as principal and by [fol. 76] National Surety Company of New York, a corporation, as surety, which is approved by the court.

In United States District Court

Record Entry Citation Issued; Bond Filed and Approved in Cause No. 6300—April 11, 1927

This day Citation is issued and signed by the Court admonishing the plaintiff Myrtle J. Johnson to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the date said citation bears, which said citation is returned with endorsement of service thereon, and the defendant files its bond on appeal in the sum of $50,000.00, signed New York Central Railroad Company as principal and by National Surety Company of New York, a corporation, as surety, which is approved by the court.

Bond on writ of error for $20,000, cause No. 6299, approved and filed April 11, 1927, omitted in printing.

[fols. 77 & 78] Bond on writ of error for $50,000.00, cause No. 6300, approved and filed April 11, 1927, omitted in printing.

[fol. 79] In United States District Court

Order Allowing Time to File Bill of Exceptions in Cause No. 6299—Filed April 11, 1927

Now on this day comes the defendant, New York Central Railroad Company, a corporation, and prays the court to make an order allowing it sixty (60) days after the ad-

journment of this court in which to file its bill of exceptions herein.

Wherefore, for good cause shown it is ordered that the defendant, New York Central Railroad Company, be and it is hereby allowed sixty (60) days after the adjournment of this present term of court within which to have settled, allowed and filed, its bill of exceptions herein.

Merrill E. Otis, Judge.

Dated at Kansas City, Missouri, this 11th day of April, 1927.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING TIME TO FILE BILL OF EXCEPTIONS IN CASE No. 6300—Filed April 11, 1927.

Now on this day comes the defendant, New York Central Railroad Company, and prays the court to make an order allowing it sixty (60) days after the adjournment of this court in which to file its bill of exceptions herein.

Wherefore for good cause shown it is ordered that the defendant, New York Central Railroad Company be and it is hereby allowed sixty (60) days after the adjournment of this present term of court within which to have settled, allowed and filed, its bill of exceptions herein.

Merrill E. Otis, Judge.

Dated at Kansas City, Missouri, this 11 day of April, 1927.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER, MAY 26, 1927, EXTENDING TIME TO FILE BILL OF EXCEPTIONS IN CAUSE No. 6299—Filed May 26, 1927

Now on this day comes the New York Central Railroad Company, defendant in the above entitled cause, and it being made to appear to the court that it will be unable to

complete its Bill of Exceptions in the above entitled cause in time to file the same on or before June 22nd, 1927.

[fol. 80] It is therefore ordered that for good cause shown, the time for filing said Bill of Exceptions herein be and the same is extended to on or before the 25th day of July, 1927.

Merrill E. Otis, Judge.

Dated 26 day of May, 1927.

[File endorsement omitted.]

In United States District Court

Order, May 26, 1927, Extending Time to File Bill of Exceptions in Cause No. 6300—Filed May 26, 1927

Now on this day comes the New York Central Railroad Company, defendant in the above entitled cause, and it being made to appear to the court that it will be unable to complete its Bill of Exceptions in the above entitled cause in time to file the same on or before June 22nd, 1927.

It is therefore ordered that for good cause shown, the time for filing said Bill of Exceptions herein be and the same is extended to on or before the 25th day of July, 1927.

Merrill E. Otis, Judge.

Dated May 26, 1927.

[File endorsement omitted.]

In United States District Court

Order, May 26, 1927, Extending Time to File Transcript in Cause No. 6299—Filed May 26, 1927

Now on this day comes the defendant, New York Central Railroad Company, in the above entitled cause and it being made to appear to the court that the clerk of this court will be unable to complete the transcript of the record in the above entitled cause in time to file the same in the United States Circuit Court of Appeals for the Eighth Circuit on or before June 10th 1927.

It is therefore ordered that for good cause shown, the time for filing said transcript in the United States Circuit Court of Appeals of the Eighth Circuit be and the same is extended to on or before the first day of August, 1927.

Merrill E. Otis, Judge.

Dated 26 day of May, 1927.

[File endorsement omitted.]

[fol. 81] In United States District Court

Order, May 26, 1927, Extending Time to File Transcript in Cause No. 6300—Filed May 26, 1927

Now on this day comes the defendant, New York Central Railroad Company, in the above entitled cause, and it being made to appear to the court that the clerk of this court will be unable to complete the transcript of the record of the above entitled cause in time to file the same in the United States Circuit Court of Appeals for the Eighth Circuit on or before June 10th, 1927.

It is therefore ordered that for good cause shown, the time for filing said transcript in the said United States Circuit Court of Appeals of the Eighth Circuit be and the same is extended to on or before the first day of August, 1927.

Merrill E. Otis, Judge.

Dated May 26, 1927.

[File endorsement omitted.]

In United States District Court

Order, July 5, 1927, Extending Time to File Bill of Exceptions in Cause No. 6299—Filed July 5, 1927

Now on this day comes the New York Central Railroad Company, defendant in the above entitled cause and it being made to appear to the court that it will be unable to complete its Bill of Exceptions in the above entitled cause in time to file the same on or before July 25th, 1927.

It is therefore ordered that for good cause shown, the time for filing said Bill of Exceptions herein, be and the same is extended to on or before the 25th day of August, 1927.

Merrill E. Otis, Judge.

Dated 5th day of July, 1927.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER, JULY 5, 1927, EXTENDING TIME TO FILE BILL OF EXCEPTIONS IN CAUSE NO. 6300—FILED JULY 5, 1927

Now on this day comes the New York Central Railroad Company, defendant in the above entitled cause, and it being made to appear to the court that it will be unable to complete its Bill of Exceptions in the above entitled cause in time to file the same on or before July 25th, 1927.

[fol. 82] It is therefore ordered that for good cause shown, the time for filing said Bill of Exceptions herein be and the same is extended to on or before the 25th day of August, 1927.

Merrill E. Otis, Judge.

Dated July 5, 1927.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER, JULY 18, 1927, EXTENDING TIME TO FILE TRANSCRIPT IN CAUSE NO. 6299

Now on this day comes New York Central Railroad Company, defendant in the above entitled cause and it being made to appear to the court that it will be unable to complete the transcript of record in the above entitled cause in time to file the same in the United States Circuit Court of Appeals for the Eighth Circuit on or before August 1st, 1927.

It is therefore ordered that for good cause shown, the time for filing said transcript in the said United States Circuit Court of Appeals of the Eighth Circuit be and the same is extended to on or before the 1st day of September, 1927.

Merrill E. Otis, Judge.

Dated 18 day of July, 1927.

[File endorsement omitted.]

In United States District Court

Order, July 18, 1927, Extending Time to File Transcript in Cause No. 6300

Now on this day comes the New York Central Railroad Company, defendant in the above entitled cause, and it being made to appear to the court that it will be unable to complete the transcript of the record in the above entitled cause in time to file the same in the United States Circuit Court of Appeals for the Eighth Circuit on or before August 1st, 1927.

It is therefore ordered that for good cause shown, the time for filing said transcript in the said United States Circuit Court of Appeals of the Eighth Circuit be and the same is extended to on or before the 1st day of September, 1927.

Merrill E. Otis, Judge.

Dated July 18, 1927.

[File endorsement omitted.]

[fol. 83] In United States District Court

Record Entry Bill of Exceptions; Stipulation and Exhibits Filed, July 21, 1927, in Cause No. 6299

This day comes defendant by counsel and files its Bill of Exceptions herein, also files Stipulation and Exhibits.

In United States District Court

Record Entry Bill of Exceptions; Stipulation and Exhibits Filed, July 21, 1927, in Cause No. 6300

This day comes defendant by counsel and files its Bill of Exceptions herein, also files Stipulation and Exhibits.

In United States District Court

No. 6299

Edward H. Johnson, Plaintiff,

vs.

New York Central Railroad Company, Defendant

Bill of Exceptions

Appearances:

Mr. C. C. Chilcott, 918 Commerce Building, Kansas City, Missouri; and Mr. Price Wickersham, 918 Commerce Building, Kansas City, Missouri; appearing for the plaintiff.

Messrs. Marley & Reed, 918 Scarrit Building, Kansas City, Missouri, appearing for the plaintiff.

Mr. Marley: I would like to save an exception to the ruling of the court by which both these cases are consolidated to be tried together.

(To which action and ruling of the court the defendant in the case of Edward Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.)

(Jury sworn to answer questions, examined by the court on their qualifications as jurors, challenges made, and jury duly empaneled and sworn to try the issues.)

Mr. Chilcott: Your honor, we would like to ask the rule be invoked.

[fol. 84] The Court: Very well. Call the witnesses who may be in the corridors and ask them to come in, Mr. Bailiff.

Mr. Marley: If the court please, I believe we can agree that your honor can instruct the stenographer to note an exception on behalf of the party against whom the ruling is adverse separately as to each—in each case and as to each party, without our noting from time to time exceptions.

The Court: Well, our practice is here that exception should be noted when counsel desires to save exceptions, and we will adhere to that practice; but whenever an exception is noted let it be an exception in both cases.

Mr. Marley: That is, it is a separate exception, your honor; you know the federal rule with reference to exceptions, you can't have a double-barreled exception.

The Court: Let the exception be noted separately in both cases, but it must be noted at the time. Let all the witnesses who expect to testify in these cases arise and be sworn.

Mr. Marley: Our witnesses are not here, your honor.

The Court: Instruct them when they come not to come in the court room.

Mr. Marley: All right.

(Witnesses sworn.)

The Court: It has been requested in this case that the rule be invoked, and that request will be granted. That means that the witnesses—excepting the plaintiff, of course—will not be permitted to remain in the court room during the trial of the case, but will remain in the corridors and within call; and while in the corridors you will not discuss the testimony that you will give, and after you have testified you will not discuss the testimony that you have given with anyone, excepting with the attorneys on either side. You will now be excused until you are needed. Remain within call.

Proceed with the case.

Opening Statement on Behalf of Plaintiffs

Mr. Chilcott: May it please the court and gentlemen of the jury: This is the case of Edward H. Johnson and his

wife, Myrtle Johnson, against the New York Central Railroad Company for injuries received by Mrs. Johnson by reason of the negligence of the New York Central Railroad Company.

[fol. 85] The evidence in this case will show that some time in the month of August or September Mrs. Johnson, who at that time conducted what is known as the Jane's Beauty Shop about Forty-sixth and Troost avenue, made a trip to San Francisco to attend the hairdressers' convention. While there there was a certain machine known as a Nestle wave machine which was demonstrated to her, and on her way back she was coming east as far as Chicago, going up through Canada, and then as far as Chicago, and thence was coming to Kansas City. She then concluded that she would go on to New York and see about the purchase of one of these Nestle machines for her business.

She bought a ticket over the New York Central Railroad Company, and in company with her husband's brother's wife, also named Mrs. Johnson, went to New York, Mrs. Johnson being a writer for magazines and having some business in New York City. Both of these ladies went to New York.

They remained in New York about four or five days had these machines demonstrated to them, and Mrs. Imogene Johnson, who is the writer, attended to her business, and then they went up to Nyack, New York. Nyack, New York, is a—at that place there is a sort of a country club for some kind of a religious organization. I don't know what it is, but it is just across the Hudson river from Harmon, New York.

Now, before they went to Nyack they purchased their tickets over the New York Central in New York to board the train at Harmon, and purchased their sleeping car ticket for lower 8 in car 64 from Harmon to Chicago. At Chicago they were going to rebuy thence to Kansas City. They boarded the train at Harmon, New York, on Sunday, the 27th day of September, at 6:30 o'clock in the evening, and they proceeded into the dining room or dining car and had their supper. They then went to the club car and played some games of rummy there, and about 11:30 they started back to their car to retire for the night.

As I said before, they were in lower berth No. 8 in car No. 64, this being an all-Pullman train with a dining car

on the rear and a club car on the front. The schedule of this train from New York to Chicago is approximately 22 or 23 hours, covering a distance of approximately a thousand miles, and was one of the fastest New York Central trains.

Along about 11 or 11:30 this train was somewhere in the vicinity of New York or Syracuse, as may be seen by the schedule of the train.

[fol. 86] Now, these ladies started back to their car. The plaintiff, Mrs. Myrtle Johnson, being ahead, and Mrs. Imogene Johnson being right behind her. They stopped at lower berth No. 8, the cars being dark at that time except for the night lights and the lights which were in their berth. They had several suit cases with them, but—they had their night things, night clothing, in one suit case; both of them in one suit case. They got this suit case out and put it upon the berth to open it up where they would have the light of their berth lights. The plaintiff at that time was standing holding to the curtain, her hand resting against the lower part of the upper berth. The train was going at a pretty good rate of speed. Mrs. Imogene Johnson was sitting on the side of the berth near the head, the plaintiff being near the foot, and the curtains were parted and she was sitting with her feet in the aisle on the side of the berth near the arm of the forward part of the berth, and they had just opened up the suit case and turned it back to get their nights things out.

Just about the time that happened, suddenly and with great force and violence there was a jerk and a lurch of that train. This lurch was of such violence that it swung Mrs. Myrtle Johnson, the plaintiff in this case, around, threw her forward, but she still had her grasp on the curtain, and it swung her around so that she struck the left side of her head upon the sharp corner of the upper berth. It threw her then to the floor, tearing her grasp away from the curtain, and threw her to the floor to the head of her berth, where she became sick at her stomach and her head—sort of dizzy, and her head ached and hurt her. She don't remember much more about that until she remembers sitting on the edge of the berth immediately afterwards.

Mrs. Johnson was sitting to the head of the berth. When this lurch or jerk of the train came she was thrown forward until she hit the edge of the berth; that is, the back

of the seat of the lower berth, and then the train suddenly started forward and the car tipped and swerved and she was thrown down toward the foot of the berth, her hand coming into contact with the window at the foot of the berth.

She didn't know that Mrs. Johnson had been injured, that the plaintiff had been injured, at that time; but when she scrambled to her feet and got in her place she then saw Mrs. Johnson sitting on the floor at the head of the berth holding her head and crying. She then got her up and placed her—sat her on the edge of the berth, and Mrs. Johnson complained of her head hurting her and was crying. Mrs. Imogene Johnson then felt of her head, after [fol. 87] a little while, and some minutes after that, why, a bump raised on the side of her head here.

They then got their night clothing out and proceeded—no, they didn't get their night clothing out, because the plaintiff complained of a nausea, sickness at her stomach, and she was taken immediately to the ladies' room, where her face was bathed in cold water and she stood over the bowl for some time but did not vomit. She was then seated in the ladies' dressing room. Mrs. Imogene Johnson went back and got their night clothing and she was then dressed in her night clothing, undressed and put her night clothing on, and was helped back to her berth. Her head hurt her considerable during that period of time.

She lay awake for quite a while, but finally dozed off into a sleep, never thinking that she was injured to the extent the evidence will show here. She didn't think at that time—just thought she had bruised her head. She slept toward the window, and Mrs. Imogene Johnson sleeping toward the aisle.

Some time the next morning along about 10 o'clock Mrs. Imogene Johnson was awakened by somebody pulling at her night clothing. She ultimately became fully awake, and then she became conscious of the plaintiff here, Mrs. Johnson, groaning and moaning and making some sort of guttural sounds and pulling at her nightgown. She looked around, and Mrs. Johnson had reached over with her left hand and was pulling at her nightgown and making these guttural sounds in an effort to arouse Mrs. Imogene Johnson. She then became fully awake and inquired what was

the matter, and Mrs. Johnson, the plaintiff, was unable to speak to her, being unable to do anything except to emit these guttural sounds. She felt of her and turned her over on her back and attempted to rub her back to see if she could give her some relief, and her hand and leg and side appeared to be cold. When she sat her up in bed she would fall over on her right side, and her face was twisted until her mouth was drawn around—the right-hand side of her face was drawn around toward her chin. She couldn't say anything to indicate what had happened to her.

The train crew was roused and inquiry made for a surgeon or a doctor. Nobody was found except a nurse who came in. They wired ahead to Chicago for a physician. She was unable to walk and was unable to feed herself.

Now, the evidence in this case will show that she cried considerable and became hysterical on account of her condition; that she was taken to Chicago. There she had to [fol. 88] be taken off, carried off the train, placed in a wheel chair, and transferred to the Dearborn Street station. A surgeon of the New York Central Railroad Company met them at the LaSalle Street station, I believe it was, and then was taken over to the Dearborn Street station, there put in a drawing room on the Santa Fe train, and brought home, arriving in Kansas City on the morning, I think of the 29th day of September, 1925, where she was immediately taken to the Grace hospital and attended by Dr. St. Elmo Sanders.

She remained in that hospital for approximately 10 days, where she was given such treatment as could be given her, and several other doctors have treated her. They will be here and the jury can hear their testimony.

Now, gentlemen, she was then taken to her home, where she remain for a long period of time, until she could walk; and she had to learn to walk over again. And at that time she was engaged in the beauty parlor business.

The evidence will show in this case that she started that business along in the fall of 1922; that she was a very fast and dexterous worker and worked very hard, and that at the time of her injury she weighed approximately 160 pounds; that she could carry on an articulate and continuous conversation; that she was active and agile in her movements, and that she was a business woman and knew what

she was doing and had ability to concentrate and work out her own business problems.

Now, the evidence will show that in the year 1924 that her beauty parlor business netted her $4,000; that in the year 1925 she was only able to make $1,300 out of that business because of her inability to attend to it; that in the year 1926 she has made only a little over $1,000; that she has spent considerable money in efforts to cure herself; that at the present time her hand and her foot are partially paralyzed; that she is unable to grasp things; she is unable to manipulate the irons with which they make these permanent waves—I don't know what it is myself, but she is unable to do that.

The evidence, we think, will show this unquestionably, that she has this injury and that it is permanent.

She continued to get better up until about 6 or 7 months ago, and she has been—made no improvement since.

Now, the evidence in this case will further show that when she was taken into the Grace hospital that her skull was [fol. 89] x-rayed and there was no evidence, as the doctors say, of pathology; there was no evidence of a fracture of the skull. But her head was x-rayed just last week and at the place where she got this blow the x-ray shows that there is at that point a thickening of the skull or of the membrane which encloses the skull at the point where she was injured, and that this thickening of that membrane or thickening of the skull causes a pressure upon the brain cells at that particular place which has resulted in this partial paralysis and that she will never be any better than she is at this time.

Now, gentlemen, we don't know what the defense in this case is going to be. We have heard rumors, but this girl was a strong, healthy, able-bodied girl before she was injured. She hadn't had a doctor since she had cut her teeth as an infant, and she was strong and healthy at this time; and the evidence in this case will show that her condition as it is at the present time is the sole result of the negligence of this defendant and the injuries which she received at that time.

Now, gentlemen, she was only 31 years of age at the time when this catastrophe overtook her. She not only conducted her business in the beauty parlor but she was a

housewife at home and attended her household duties, and was a wife to her husband, Edward H. Johnson. The evidence will show that since her injury she has been irritable; that she doesn't have an articulate speech; that she will stop in the middle of a speech, middle of one sentence, and go off rambling on a different sentence; that when she attempts to manipulate anything or lift anything with this right hand that the movement is slow and sluggish, and it appears that she is unable to place her hand where the ordinary persons—the logical place to remove and lift this object.

The evidence will further show that she has tried in every way, shape and form to exercise this right side so that it will bring it back to what it was before she was injured, and she has failed up to the present time; and the evidence of the doctors will show that she cannot get any better.

Now, she has asked in her petition for $25,000 damage. Her husband has asked in his petition for $10,000 damage. Gentlemen, if we prove what I have told you we will expect at your hands a verdict which will compensate this lady for the injuries which she has received and which will compensate her for the loss of earnings which she has hereto- [fol. 80] fore suffered and which she is likely to suffer in the future.

Thank you very much.

Opening Statement on Behalf of Defendant

Mr. Marley: Now, if the court please and gentlemen of the jury, the evidence on behalf of the defendant will show that Mrs. Myrtle Johnson has for some time been conducting a beauty parlor at 4611 Troost Avenue in Kansas City, Missouri. We believe the evidence will show you that she is a woman of considerable energy, both physical and nervous; that she has applied herself assiduously to her work and carrying on the responsibilities of her business she had so reached a state of nervous irritation; that some time prior to her trip to New York and San Francisco she had consulted a doctor with reference to her condition and he advised her that she must rest a while; if not she would

have a nervous breakdown. She paid no attention to the doctor's advice, but continued on in her work.

As was said, she went to San Francisco and was there, and from there she went on to Chicago, and her mind was intent on her work and on developing her business and learning about these machines. It also, we think, will develop that in 1925 there was a law passed by the state of Missouri creating a beauty parlor commission which required the operators of beauty parlors to pass an examination as to experience and ability and a certain degree of training, and she was very anxious, as we believe, to pass that examination. She was ambitious, as it were, to excel in her work, and she kept on working that way. And she went to New York City in a nervous condition, relying absolutely on her nervous energy.

She got to New York City—I didn't know that she had gone over the New York Central going, but she got to New York City and took a post graduate course there in the operation of one of these hair machines; and while she was there she naturally went to the stores and put in her time, I judge, sight-seeing.

While there she was—I think it was in New York City—was in the store and became dizzy and got so she could hardly see to pick up her grip. And about three months prior to going there she was affected by what is known as a double vision, as we believe, indicating that the optic nerves had been affected so that the vision were double. [fol. 91] After being there for about five days she did get lower 8 in car 64 of our train No. 19 and went up into New York at a place near Harmon. Harmon is about 32 miles from the Grand Central Station out of New York City toward Chicago. Her ticket was to Chicago.

Now, when she gets to the depot at Harmon the usher helped her and her sister in law, Imogene, to the train; and our evidence will show that they immediately asked for the club car and went forward to the club car. They were in that club car—now, right there I am going to stop for a minute and call your attention to the kind of a train we operate.

The New York Central, as probably everybody knows, and the evidence will disclose if you don't know it, is a 4-track railroad. There is a track for each class of trains. A passenger train going west is on one line of track, going east

is on another, and a freight train going west is on one line and a freight train going east on another. This train was one of our fast trains, as stated by plaintiff's counsel, and it had nothing but Pullman sleepers and this club car. It made but few stops. The sleepers are the very best standard sleepers, our track, we will show, is in elegant condition, and the engineer of this train was a man that had been working for the New York Central for forty-two years and a half; the conductor of that train was a man who had worked for the New York Central for 42 years; the fireman of that train was a man that had worked for it for 10 years; the brakeman had been working for the New York Central for about 16 years.

When the train came into Harmon they got on, and, as I said, went to the club car. They played cards there with some parties and smoked cigarettes and drank lemonade until about—well, it was long after the time that they put out the main lights of the sleeper and have the night lights on, but it was probably between 11:30 and 12 o'clock, and just about the time the train was due—was going into Syracuse, New York.

Imogene and the plaintiff's wife went into their sleeper and were laughing and talking, as the evidence, as we believe will show. They went to bed, or Imogene was in bed, and then Myrtle, the plaintiff's wife, was undertaking to open her grip to get something out of it when there was a lurch of the train, and as we understand her head was struck against the upper berth.

[fol. 92] Now, there was no complaint made to us or no outcry or anything of which we had any knowledge, but, as stated by the plaintiff's attorney, which we think is probably correct, they slept until about 10 o'clock the next morning, after they once went to bed and went to sleep.

Then about—I think it was about 11 or 11:30 the knowledge came to the train men that she had been hurt, and as I believe the evidence will show, had not gotten up. Of course, the train men immediately tried to find some doctor on the train, but there was some lady who claimed to be a nurse that went there and offered to give them any assistance she could; but she was only there for a short time.

As stated, the train men wired to Chicago and had the local surgeon, doctor, of the New York Central Lines see her and see what the trouble was; and he saw her at the

rest room, the ladies' rest room, in the LaSalle street station in Chicago. He examined her and found no indications of any bruise, but he did find her highly hysterical.

Our evidence will show you—we will have the engineer here and the train men—that the train ran through on time; there was no unusual motion of the car in any way. Of course, in handling, going around curves and so forth at a high rate of speed, the trains will lurch, and the evidence will show that on account of that all cars are so fixed and arranged on the [tracks] that there is a balance to meet the combating forces when you swing around a curve, and there isn't a one of them noticed at that time any unusual lurch in the train at all, and the train was on time; there was nothing wrong with the train.

Then, as stated, she came here to Kansas City. She went to the Grace hospital and was under the care of Dr. St. Elmo Sanders, and for some reason she went to another doctor, I think at Thirty-first and Troost, and he treated her for quite a while. She for some reason quit him and went to another doctor down town here and he treated her for a while, and she quit him, then finally she went, I think, to a hospital over in Kansas City, Kansas, and that doctor treated her. But I think the evidence will show you that not any of them were treating her for a blow on the head, but on account of her nervous condition; and we believe that the evidence will show you that this condition of which she speaks is a condition due entirely to her nervous breakdown and not to any blow that was received on the head at that time; and we believe that when we establish those facts [fol. 93] that under the instructions of the court we will receive a verdict from your hands.

The Court: Call your first witness.

Mrs. Imogene Johnson, was thereupon called as a witness, on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please. Tell the jury your name, please.

A. Mrs. Imogene Johnson.

Mr. Marley: If the court please, the defendant New York Central objects to the introduction of any evidence in support of either of these petitions for the reason that neither petition states a cause of action against the defendant railroad company.

The Court: Overruled.

Mr. Marley: Now, I desire to note an exception, a separate exception for each case.

The Court: Very well.

To which action and ruling of the court the defendant in case of Edward H. Johnson vs. New York Central Railroad Company then and there, by its counsel, duly excepted at the time and still excepts.

To which action and ruling of the court the defendant in case of Myrtle J. Johnson vs. New York Central Railroad Company then and there, by its counsel, duly excepted at the time and still excepts.

By Mr. Chilcott:

Q. Now, Mrs. Johnson, I wish you would speak up in a loud tone of voice so that the last juror over here can hear every word that you say. State your name, please.

A. My name is Mrs. Imogene Johnson.

Q. And where do you live, Mrs. Johnson?

A. At 3435 Bellefontaine.

Q. How long have you lived in Kansas City?

A. For about 25 years.

Q. And what is your husband's name?

A. F. Spencer Johnson.

Q. What relationship, if any, are you to the plaintiff, Myrtle J. Johnson, in this case?

[fol. 94] A. We married brothers. I married F. Spencer Johnson and she married Edward Johnson.

Q. How long have you known Myrtle J. Johnson?

A. Since she married Ed Johnson about 14 years ago.

Q. What has been her condition of health at that time, up to the time she was injured, as far as you have been able to observe?

Mr. Marley: That is objected to as irrelevant and incompetent.

The Court: Overruled.

A. She has the appearance of having perfect health. She had very good color and bright, clear eyes; was a girl that always had a very good appetite, and she was quick in her movements and interested in all athletics and interested in promoting herself in her business.

Mr. Marley: I object to this, your honor.

The Court: Yes, the objection to that part of the answer will be sustained, as stating a conclusion.

Mr. Chilcott: Yes.

Q. How did she appear in regard to weight prior to this accident?

A. She was——

Mr. Marley: Well how long prior?

Mr. Chilcott: Immediately prior to this accident.

A. Immediately prior to this accident she was a heavy-set girl. We have been weighed together several times and she always weighed around 160 at that time.

Q. Now, state what she did, if anything, in regard to handling musical instruments.

A. She played a saxophone fairly well——

Mr. Marley: I presume that is offered for the purpose of just showing——

Mr. Chilcott: Her dexterity.

Mr. Marley: —her dexterity.

Mr. Chilcott: Her dexterity with the use of her hands.

A. She played the piano very well, and the banjo-ukulele fairly well.

Q. Did she play any other musical instruments?

A. Jew's harp.

Q. I wish you would mark that as an exhibit.

[fols. 95 & 96] (Photograph marked "Plaintiff's Exhibit 1.")

Q. Mrs. Johnson, I hand you plaintiff's exhibit 1 and ask you to tell the court and jury what that is.

Mr. Marley: It speaks for itself, your honor, I presume.

The Court: Well, it is a photograph, and if so of whom? You can answer that.

A. It is a photograph of Myrtle J. Johnson that I took.

By Mr. Chilcott:

Q. When was that taken?

A. It was taken about three weeks before the accident, in San Francisco.

Mr. Chilcott: I offer in evidence plaintiff's exhibit 1.

By Mr. Marley:

Q. Now, when did you say this was taken?

A. It was about three weeks before the accident. I would have to figure exactly. I couldn't tell exactly. It was on the trip.

Mr. Marley: Well, it was approximately that time.

The Court: Submit it in evidence.

(Which said document, so offered, introduced and admitted in evidence as Plaintiff's Exhibit 1, was thereupon exhibited to the jury; and is in words and figures as follows, to-wit):

(Here follows photograph marked side folio pages 97 and 98)

[fol. 99] (Photographs marked "Plaintiff's Exhibits 2 and 3.")

By Mr. Chilcott:

Q. Mrs. Johnson, I also hand you plaintiff's exhibit 2 and ask you to state to the court and jury what that is.

A. It is a picture of myself and Myrtle J. Johnson holding the baby of a friend.

Q. When was that picture taken?

A. It was taken the summer before this one of the accident.

Q. In what year?

A. The summer of 1924.

Q. 1924.

A. Fall, rather. It was in September.

Mr. Chilcott: I offer in evidence plaintiff's exhibit 2.

Mr. Marley: Just offer them both; have them both identified and you can offer them at once.

By Mr. Chilcott:

Q. I hand you plaintiff's exhibit 3 and ask you to tell the court and jury what that is.

A. It is a picture of Myrtle J. Johnson and two other owners of beauty shops that were with us on this convention at San Francisco, and the picture was taken just about three weeks before the accident. It was on this same trip.

Mr. Chilcott: I offer in evidence plaintiff's exhibit 3.

By Mr. Marley:

Q. You say these were taken on your trip to San Francisco?

A. During the time we were in San Francisco.

Q. That would be in the fall of the year 1925?

A. Yes.

Mr. Chilcott: No, she didn't say that, Mr. Marley.

The Witness: It would be in the late summer. It was while we were in San Francisco on this convention.

By Mr. Marley:

Q. That is what I mean; and then you went from there on to Chicago, didn't you, and then to New York?

A. Yes.

By Mr. Chilcott:

Q. No, both of them weren't taken at the same time, as I understand.

A. This one was taken on the San Francisco convention.

Mr. Marley: Refer to the exhibit number.

The Witness: Exhibit No. 3.

[fol. 100] By Mr. Chilcott:

Q. And Exhibit No. 2 was taken when?

A. Exhibit No. 2 was taken the fall before; just about a year before.

Q. I see. I don't know whether I offered them in evidence or not, but I offer them again in evidence.

(Which said documents, so offered, introduced and admitted in evidence as Plaintiff's Exhibits 2 and 3, were thereupon exhibited to the jury; and are in words and figures as follows, to-wit:)

(Here follow photographs marked side folio pages 101 and 102)

[fol. 103] Q. Now, Mrs. Johnson, did you start out with the plaintiff on this trip which ultimately took you to New York?

A. Yes, sir.

Q. Now, speak up. Did you hear what she said then?

Mr. Marley: She said, "yes, sir."

By Mr. Chilcott:

Q. And where did you start from?

A. Kansas City.

Q. And when did you leave Kansas City?

A. I couldn't tell you the exact date. It was the last of August.

Q. Of what year?

A. Of 1925.

Q. And where did you go?

A. We went to the Grand Canyon and we made several stops and went on out to Los Angeles to visit my brother, and then on to the convention. I think the convention was to be held around the 4th or 5th of September, but I really don't remember the exact date.

Q. And the convention was held where?

A. At the Palace Hotel in San Francisco.

Q. How long did you remain in San Francisco?

A. I couldn't tell you exactly. It was around five or six days.

Q. Where did you go from San Francisco?

A. My cousin drove us to Sacramento and on several trips around Sacramento, and then we took a train to—up near Canada, Victoria, and—let's see; took the boat from Los Angeles to San Francisco, then my cousin took us on some motor trips, he and his wife, and then we took the train to Victoria and Vancouver, around in there, and

101=102

PLAINTIFF'S EX. 3

stopped at Seattle—we stopped all along, because we were sight-seeing. We had never been west before.

Mr. Marley: I think, your honor, that is hardly competent.

Mr. Chilcott: Yes, you don't need to go into detail like that.

Q. What was Mrs. Myrtle Johnson's, the plaintiff's, appearance in health at that time?

A. She had every appearance of being an unusually healthy girl, because she was heavy-set——

Mr. Marley: Wait. I object to this.

The Court: Objection sustained.

Mr. Chilcott: Yes.

[fol. 104] Q. Now, what time did you get to Chicago; about what? You don't need to be exact.

A. Well, it was around in the morning, or around noon.

Q. Of what day?

A. I don't know.

Q. About what day?

A. What date?

Q. About what day in the month?

A. Well, it was around the middle of the month, I would say. I don't remember.

Q. What month?

A. In September.

Q. 1925?

A. M-hm.

Q. And what did you do. Where did you go from Chicago?

A. Went right on to New York, on the—I believe we took the New York Central there. That is where we changed.

Q. How long did you remain in New York?

A. About five or six days.

Q. And tell the jury whether or not you had business in New York.

Mr. Marley: That is immaterial. You mean she had business?

Mr. Chilcott: Yes.

Mr. Marley: I object to that, your honor, as immaterial; incompetent.

The Court: Sustained.

Mr. Chilcott: Well, that is all right.

Q. What was Mrs. Johnson's appearance in New York?

Mr. Marley: As to what?

Mr. Chilcott: As to health.

A. Her color was good, her movements were quick, her appetite was good, she slept well, and she was anxious to——

Mr. Marley: Wait, I object to that.

Mr. Chilcott: You can't say that.

Q. Now, who attended to purchasing the tickets and railroad accommodations on this trip?

A. Well, we would at different times one would and another time another would. It didn't make any particular difference. But I did it the day that we purchased the tickets before we came on to New York.

Q. Where did you purchase your tickets from New York to Los Angeles—I mean New York to Chicago?

A. At the New York Central ticket office.

[fol. 105] Q. Do you know what date you purchased them?

A. Let's see. Well, the date the ticket is stamped, is that the date that you purchased it or is that the date that you use? Well, the ticket was stamped the 27th; that would be two days before they were used. From the 27th of August.

Q. Wasn't that September?

A. I mean September. Purchased them the 26th, the 26th of September.

Mr. Marley: It is admitted that plaintiff purchased her tickets and was routed on the New York Central, and that she was a passenger of that car, and had berth No. 8 car No. 64 on train 19 of the New York Central.

By Mr. Chilcott:

Q. Now, Mrs. Johnson, after you purchased this ticket where did you go from New York?

A. We took a ferry and then a line connecting with the ferry to Nyack, New York.

Q. Where is Nyack, New York?

A. On the Hudson River, just about two hours north of New York.

Q. And where is Nyack, New York, with reference to Harmon, New York?

A. Nyack is on the west side of the Hudson River, and Harmon is on the east side of the Hudson, and Harmon is a little more to the north—oh, let's see, I would say about, I really couldn't say, it would probably be an hour on the train after you crossed the ferry.

Q. State whether or not you boarded the New York Central at Harmon, New York, to go to Chicago?

A. I did.

Q. What date was that?

A. 27th of September.

Q. What did you do while you were up at Nyack?

A. We were visiting a girl friend of mine who was Secretary of the Country Club. Nyack, New York, is just at the foot of the mountains.

Q. What time did you board this New York Central to Harmon—I mean at Harmon?

A. About six thirty.

Q. How long did you remain at Nyack?

A. We got in there the evening before, and stayed all night, and that day until late afternoon when they took us down to the ferry where we ferried across to a little town called Tarrytown, and got on a suburban train that connected with the New York Central at Harmon.

Q. What time did you board the New York Central at Harmon?

A. About six thirty; I couldn't say the exact minute.

Q. Was that on the 27th of September?

A. Yes, sir.

[fol. 106] Q. After you boarded that train, what did you do?

A. We put our grips down at our berth; of course the berths hadn't been made down then, and went back into the ladies' room and washed and straightened our hair and took off our coats and left them at our seats, but kept

our hats on, and went back to the dining car where we had a lovely dinner there in the diner.

Q. What was the plaintiff's appearance when you boarded the train at Harmon in regard to health?

A. Her eyes were unusually bright, and her cheeks were rosy, and she was heavy set and she was apparently very active and apparently in the best of spirits; seemed to be full of enthusiasm that we were at last headed toward home.

Mr. Marley: I hardly think that is competent.

The Court: I don't suppose it is. Strike out "That she seemed to be full of enthusiasm."

Mr. Chilcott: I want to ask you, Mrs. Johnson, if you noticed anything extraordinary or wrong or different in her behavior on that occasion?

Mr. Marley: Object, incompetent, and a conclusion of the witness.

The Court: Overruled.

Mr. Marley: Note exception. That means a separate exception in each case.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant, in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. She was just her usual merry, happy, vivacious self.

Mr. Marley: Ask that be stricken out.

The Court: Answer will be stricken out as not responsive.

Mr. Chilcott: Did you notice anything unusual, different about her?

The Court: As compared with the condition you have previously told?

A. No.

[fol. 107] By Mr. Chilcott:

Q. How long were you in the dining car?

A. I remember that we were there quite a while; we were quite hungry.

Q. Did you notice anything in regard to her appetite on that car?

A. We both had unusually good appetites that night.

Q. Did she eat much or little?

A. She eat a great deal.

Q. Then where did you go?

A. We passed through our car; they had begun making down the berths, and so we weren't the least bit sleepy; we had slept so late that morning and we thought we would see if there was a club car.

Mr. Marley: Object to that, let her state what she did.

The Court: That particular thing doesn't have any bearing on the case.

By Mr. Chilcott:

Q. Just state what you did?

A. We went back to the club car; before we went back to the club car, we got a deck of cards out of our grip, and went on back and sat down to play rummy.

Q. How long did you remain in the club car?

A. We were the very last ones there, and there wasn't anybody about but the porter when we left the club room, club car.

Q. About what time was it when you left the club car?

A. It must have been, oh, it was after eleven, I know.

Q. Where did you go when you left the club car?

A. We went back to our berths.

Q. And state what happened after you got back there—were the berths made down?

A. Oh, yes, you see they were just about all made down when we went through before we started our card game.

Q. What lights, if any, were burning in the car at the time you went back, when you came back from the club car?

A. Sometime between eleven and mid night, and there were just the night lights burning.

Q. State whether or not there were any lights burning in your berth when you got back?

A. Yes.

Q. Were there any of the persons up and about that you saw in that car?

A. Not at that time.

Q. Well, state what you did when you went back there to your berth?

A. Well, my friend preceded me, and she was standing, stood in the aisle and suggested that we not take our heavy [fol. 108] suit cases; we had purchased so many gifts for the people at home——

Mr. Marley: I submit that is not material.

The Court: Just answer the question.

Mr. Chilcott: Just state what you did.

A. And she suggested we take our night clothes out of the grip.

Mr. Marley: Object to that.

The Court: Must not relate any of the conversation.

By Mr. Chilcott:

Q. Just state what you did.

A. I took the suit case out from under the berth and laid it up on the berth, on the bed that was made.

Q. Whereabouts did you lay it on the berth?

A. At the foot of the berth.

Q. Whereabouts was Mrs. Johnson, the plaintiff, at that time?

A. Standing in the isle at the foot of the berth, near the foot of the berth, and she stood there clutching on to several folds of curtains; her hand sort of placed in the partition at the foot of the berth that separates it from the berth just below, and just partially facing me, standing in the aisle there as the train was swaying, she was standing there holding on to this curtain, and I sat on the side of the berth about like this, with my leg braced here, and my back braced here on the arm, as you know, that comes out from the berth, and she stood just about like this, watching and talking to me in the aisle facing me, and I had my back at the pillow end of the berth with my back to the direction

we were going, and she was facing slightly toward me and slightly toward the direction we were going.

Q. Now, tell the court and jury what happened there?

A. Well, just as I opened the suit case, threw the lid back and was just reaching in for the night things, and we were going along at a very good speed, this train had been going at a good speed all evening, and just as I threw this lid back and started reaching for my night things, there came the most terrible jerk, almost as though the train were going to stop, but didn't, and jerked and swayed and went on, and at the time of this jerk, I, of course, was braced here against this arm of the seat, or the berth, the side of it, and after it yanked and went on, it threw me across, diagonally across my berth toward the foot, the lower end and right side of the train, lurched on to the bed clothes at the foot of my berth.

[fol. 109] Q. Did you see what happened to Mrs. Johnson?

A. No, sir.

Mr. Marley: Then, your Honor please, I move to strike her testimony as to what happened to her.

The Court: Overruled.

Mr. Marley: Note the exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. Now, state, Mrs. Johnson, just exactly what position you were in after this lurch and jerk you speak of, immediately afterwards?

A. I laid diagonally across our berth, my leg hanging off, that is, would be in the air, and my left hand clutching the sill of the window at the lower end of the berth, and my other hand and arm over the corner of the suit case and clutching at the bed clothes at the foot of the berth.

Q. Now, what did you do then?

A. I scrambled to my feet to see what had happened to her.

Q. State where you found her?

A. I found her in the aisle with her back toward the berth across the aisle and toward the engine, with her legs half curled up under, one leg half under, and rocking back and *and* forth, holding her head.

Q. What was she sitting on?

A. Sitting on the floor.

Q. And whereabouts, with reference to the berth that you had?

A. Well, she was sitting in the aisle, away from the berth a little ways, more toward the berth across the aisle, but near the head of the berth with her back toward the engine and toward the other berth, more like that in the aisle and across from our berth.

Q. About how far was that from where you had last observed her standing?

A. Three feet or four, about three feet, I would say.

Q. What was she saying or what noises was she making, if any, immediately?

[fol. 110] Mr. Marley: Object to that as incompetent.

Mr. Wickersham: We submit it as a part of the res jestae.

The Court: Objection overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time excepted and still excepts.

[Q.] She was rocking back and forth in the aisle, saying "Oh my head, Oh my head," and I believe she said, "Oh, my God."

Mr. Marley: Object to what she believed she said.

The Court: No; don't state what you believe she said; just state what her actions were.

By Mr. Chilcott:

Q. What did you do to her?

A. I crossed over her legs to get around behind her, and put my hand in her arm pits and lifted her up on the side of the berth where she sat, and I put my arm around her shoulders and rubbed her head and talked to her.

Q. How long did you remain there doing that?

A. Just a few minutes.

Q. How is that?

A. Just a few minutes.

Q. Now, I want to ask, and want you to tell, Mrs. Johnson, with what force that train threw you when this jerk and lurch came, as you have described?

Mr. Marley: Object as a conclusion of the witness.

The Court: She may describe what happened; the jury can determine from the facts as related by the witness of the value of the testimony.

By Mr. Chilcott:

Q. Mrs. Johnson, I wish you would tell the Court and jury what experience, if any, you have had in riding on passenger trains?

A. Well, I have had a great deal.

[fol. 111] Q. Just tell what it has been?

Mr. Marley: I move to strike that answer out, as incompetent, irrelevant and immaterial.

The Court: It may be stricken out.

A. I came from South Dakota to Kansas City when I was a youngster. I have been out to Glacier National Park once; I have been out West twice prior to this time.

Q. How far west?

A. To San Francisco, Salt Lake City and I have been to Chicago and Michigan twice before, I have been to Canada and up East once before.

Q. State whether or not you had ever been to New York prior to that time?

A. Yes, I had been to New York when I went to Canada with the trip the year before.

Q. Had you ever ridden on the New York Central prior to this time?

A. Yes, sir.

Q. Now, Mrs. Johnson, are you familiar with the usual and ordinary jerks, jolts and lurches of passenger train?

A. Yes, sir.

Q. I want you to tell whether or not in your opinion those jerks and jolts which you have described are usual and ordinary or unusual and extraordinary?

Mr. Marley: I object, because you have got to take into consideration the train, the track, the curves and grades and speed, and in order to testify to that, she should have to show she had traveled at the same rate and on the same kind of road and with the same number of curves and same condition; those things are all governed by the grade and curve and road and speed.

The Court: I understand the rule is that a person who has had much experience in traveling on railroad trains, may express an opinion as to whether a given lurch or jerk was or was not usual or unusual, but that testimony is for the jury who are the judges of the weight of the testimony, to consider, together with the other testimony; and in view of the testimony of this witness as to her experience in traveling many thousands of miles, the objection is overruled.

Mr. Marley: Exception in each case.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

[fol. 112] To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. What is your answer?

A. My answer is, that this was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced.

Mr. Marley: Move to strike that out as incompetent.

The Court: Objection overruled.

Mr. Marley: Note our exception.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. Now, as you sat there on the side of the berth—strike that out—About how long did she sit on the side of the berth after you got her up off the floor?

A. Several moments.

Q. Tell the Court and jury what was done then?

A. I helped her to the ladies' room—she told me—

Mr. Marley: Object to that.

The Court: Must not say what she told you.

A. I can't say. Well, I could see she was becoming sick.

Mr. Marley: I object to that as calling for a conclusion of the witness, incompetent. That is a conclusion.

By Mr. Chilcott:

Q. I was going to meet that objection. State what her physical condition, her physical appearance was at that time?

A. Her forehead became moist and her face felt cold and clammy to my hand, and I took her into the wash room and set her down in a chair, and washed her face with cold water, and she hung over the bowl for a moment, then I helped her back into the chair and washed her again, and [fol. 113] started rubbing her head and talking to her sympathetically——

The Court: That expression "sympathetically with her" is stricken out.

By Mr. Chilcott:

Q. Then what did you do?

A. I continued to rub her head the best I could, and give her a drink of water and asked her to sit still and I would

go get the night clothes, and undress her and help her into the berth, where I thought, if she would get to sleep——

Mr. Marley: Object to that statement——

The Court: That is stricken out, where she said "She thought etc."

By Mr. Chilcott:

Q. State what you did?

A. I gave her a drink of cold water and washed her face and rubbed her head, and then I went back to the berth and got our night clothes, and assisted her in taking off her clothes and putting her night clothes and kimono on, and my own, and helped her on back to the berth where I helped her in to the window side, into her bed.

Q. State what she did, after you put her to bed, that you observed?

A. What she did?

Q. Well, how she acted?

The Court: Not what she said.

Q. Not what she said, but how she acted. Do you know whether or not she went to sleep immediately?

A. No, she didn't.

Q. How do you know that?

A. Because she kept moaning.

Mr. Marley: I object to that as incompetent; that is a matter for cross-examination, and not direct examination. It is undertaking to support the testimony she has already given. That is not proper for direct examination.

The Court: Overruled, it is properly a description of the injury; bearing on the injury, if any, sustained by the plaintiff.

Mr. Marley: Note the exception.

[fol. 114] To which action and ruling of the Court the defendant in the case of Edward H. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. How long did you hear her groaning?

A. Until I went to sleep, which was about, probably almost an hour later.

Q. I see. Now, what is the next that you observed of the plaintiff?

A. Shall I tell how she awakened me?

Q. Yes, go right ahead and tell what she did, and what you observed?

A. Well, I felt something clutching at me, and something seemed to be jerking at me, and I was half asleep, and I didn't know what it was, and so I didn't get right up, or awaken right away, and it continued, and then I became conscious that there was a noise, a gurgling, a peculiar noise as though someone were crying and moaning, and so, of course, that came through my consciousness finally, that something was wrong and I sat up and she was sitting up behind me reaching over with her left hand and trying to get my attention, with her face all drawn, and telling me something that I couldn't understand, and crying and clutching at me.

Q. Now, Mrs. Johnson, what did you observe in regard to her face being distorted, describe that more in detail?

A. Well, the right side of her face seemed to be drawn as if someone had pulled it over to the left side; the left side more up and the right side down.

Q. Now, describe more fully the kind of sounds she was making?

A. It was an inarticulate sob. It was a crying as though she was trying to make noises and they couldn't come out the way she wanted them to.

Mr. Marley: I move to strike that out, your Honor, as to her conclusion.

The Court: I think that probably is descriptive of the situation as anything could be. Overruled.

Mr. Marley: Exception.

[fol. 115] To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York

Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. State what you observed, if anything, in regard to other parts of her physical being.

A. Well, she beat her arms like this (Witness beating her arms against her breast) telling me, trying to tell me——

Mr. Marley: Wait a minute.

The Court: You must not say what she said, or what she was trying to do.

By Mr. Chilcott:

Q. Just tell the jury what you were doing?

A. That is what made me feel of her arms and legs.

Q. Did you feel of her arm and leg?

A. I did, and it was clammy and cold.

Mr. Marley: I move to strike that out as unresponsive to the question.

The Court: It is overruled. It isn't a response, but I suppose a question would follow.

Mr. Marley: Exception.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. How did it feel?

A. Felt clammy and cold.

Q. What did you do to her?

A. Commenced rubbing and commenced manipulating her arm and leg, as my mother had taught me to do.

Mr. Marley: Wait a minute.

[fol. 116] The Court: That part will be stricken out.

By Mr. Chilcott:

Q. What experience, if any, have you had in manipulating people who were ill, seemed unable to help themselves?

A. I am the daughter of physicians and osteopaths.

Q. What experience have you had?

A. They have taught me, and I have helped them, since I was a youngster almost, just how to start a circulation, and where nerve centers were, and how to manipulate them, if anything was wrong, or if I could help anyone.

Q. Now, just state what you did.

A. I moved her right arm into the air, and brought it around like this, trying to get the circulation up. I did the same thing with her leg; I brought it in the air, and brought her knee down to her chest and back again, and did it several times, and then helped her turn over on her stomach, where I worked with my fingers up and down her spine where I knew the nerve centers were, and where she wanted me to rub.

Mr. Marley: Object to that.

The Court: What she wanted her to do, is stricken out.

By Mr. Chilcott:

Q. What did you then do, after you finished rubbing and manipulating her?

A. I rang for the porter.

Q. And what was done?

A. I asked the porter to get the conductor quickly.

Q. Did the conductor arrive?

A. The conductor did.

Q. Did you ask for anybody else?

A. I asked the conductor to see if there was a doctor on the train, that my friend had been hurt the night before in that jerk, and something had to be done for her quickly.

Q. And was there a doctor on the train?

A. There was not.

Q. What was then done?

A. The conductor said he thought there was a nurse on the train.

Q. Did you get the nurse?

A. And the conductor brought the nurse and I told the nurse about the accident of the night before, and she examined her merely by handling her, and well, really,—she couldn't really give any examination, she had nothing——

Mr. Marley: Object as merely a conclusion of the witness.

The Court: Sustained. Yes. You may state what was done only.

[fol. 117] By Mr. Chilcott:

Q. Then what was done?

A. I asked the conductor to wire ahead to the nearest station where we would be for any length of time, and have a doctor there, and he told me that he would wire at the next station for a doctor to meet us in Chicago.

Q. Now, what was done with Mrs. Johnson, the plaintiff?

A. You mean right at that particular time?

Q. Yes, right then.

A. I got dressed and went to the diner and ordered some things out for her for breakfast, and we had usually taken peaches and coffee for breakfast, so I ordered that.

Q. State how you dressed her; what help she was able to give you, or did give you?

Mr. Marley: Object as leading and suggestive.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. State what help the plaintiff gave you, if any.

A. I didn't dress her until after she had tried, given up

eating breakfast, and the maid helped me into the ladies' room where we dressed her the best we could. She was unable to give us any assistance.

Mr. Marley: Object to that.

The Court: The last portion of the answer will be stricken out, "She was unable to give us any assistance."

By Mr. Chilcott:

Q. State what you observed about her when she attempted to eat?

Mr. Marley: You mean at breakfast?

Q. At breakfast that morning.

A. She seemed to be unable to chew any food or anything like that, and seemed to have difficulty in even swallowing the liquid.

[fol. 118] Q. What time did you arrive in Chicago?

A. Well, I think it was about two in the afternoon.

Q. And what was done, or how did she leave the train upon your arrival in Chicago?

A. She was carried out of the train.

Q. Who carried her out?

A. The physician and the conductor.

Q. And what station did you arrive at?

A. At the LaSalle street station.

Q. State what her appearance was in regard to walking around at that time?

A. She seemed to be unable to walk, to put any weight or seemed to be unable to get any movement or response out of her right leg at all.

Q. State what position she carried her right hand?

A. It seemed that she had no response in it.

Mr. Marley: I object to that.

The Court: You may strike that out. State what position she carried it in.

A. She hung it.

Q. Did you feel over it at that time?

A. Yes, sir.

Q. How did it feel to you?

A. Felt cold and clammy.

Q. What if anything was done to her—strike that out—What station did you arrive at?

Mr. Marley: She has answered that.

A. LaSalle street station.

Q. What, if anything, was done to her there at LaSalle street station?

A. She was carried off the train and put into this wheel chair, and the red cap and the doctor and me all went into the sort of emergency room at the station, and they laid her on the couch, and the doctor didn't take her clothes off, or anything, and he just asked me several questions about her, and I told him about the accident, and he felt of her arm and leg, but he didn't remove her clothes or anything or give her anything.

Q. Did he feel of her anywhere else in making this examination?

A. He felt of her head where we told him she had clasped it.

Q. Anywhere else?

A. I remember that he ran his finger on her spine and felt of her arm and leg, and that is all.

[fol. 119] Q. What doctor was that that did this?

A. Doctor Pearce.

Q. Who procured him, if you know?

A. The conductor procured him; he said he was the New York Central's doctor.

Mr. Marley: Object to what he said.

The Court: Sustained.

A. Couldn't I say what I asked him?

The Court: No.

Mr. Chilcott: Then what was done after this examination at the LaSalle street station?

A. I wasn't satisfied with this examination, the doctor seemed so disinterested——

Mr. Marley: Object to that and move it stricken out.

The Court: It is stricken out.

By Mr. Chilcott:

Q. Just state what you did.

A. I called for the wheel chair, and the red cap and taxi driver carried her into the taxi, and I took her over to the Dearborn station where we were supposed to leave around five or six, something thereabouts for Kansas City on the Santa Fe.

Q. What accommodations did you get on the Santa Fe?

Mr. Marley: I fail to see whether that would be material either one way or the other.

The Court: The objection is sustained. You may show, however, what was done for her on the train on the way home.

A. I had to get a compartment.

Mr. Marley: Move to strike that out.

The Court: It will be stricken out.

Mr. Chilcott: What, if anything was done for her on the way to Kansas City?

Mr. Marley: In the way of relief, you mean?

Mr. Chilcott: Yes, in the way of relief.

Q. Strike that out. First, state—did you leave Chicago that evening?

A. Yes, sir.

Q. First, what, if anything, was done to her at the Dearborn street station?

[fol. 120] A. I asked the young man at the information desk to call me a physician.

Q. State whether a physician came?

A. He did. He called some physician in the neighborhood to get there quickly. We took her to the emergency room, and examined her.

Q. Then what was done?

A. He didn't give her anything, he just examined her.

Q. Well, what was done with her after that?

A. I got the wheel chair, and attended to getting the compartment while she was in this emergency room, and had the red cap help me and with the red cap and the doctor, we carried her into the compartment of the Santa Fe.

Q. And what did you do with her then, after you got her into the compartment?

A. She laid there, and they made this down right away, and she laid there in this berth in this compartment.

Q. What arrangement, if any, was made in regard to moving, removing her from the station in Kansas City?

A. I wired ahead to have an ambulance at the train.

Q. Now, how did she rest as far as you were able to know that night?

A. She didn't.

Q. Well, just tell what happened?

A. Well, she was crying and awake all night.

Q. And what time did you arrive in Kansas City?

A. Oh, around seven or eight, it was in the morning after breakfast.

Q. Who met you at the station?

A. Doctor Marie Esmond, and our husbands and her sister.

Q. And how was she removed from the train?

A. She was carried to the wheel chair, and then to Doctor Esmond's car, and then they drove her to the Grace Hospital.

Q. What was done to her at the Grace Hospital, if you were there and saw?

A. I didn't see.

Q. You just saw she was delivered at the Grace Hospital?

A. Yes, sir.

Q. When did you next see her?

A. Next day.

Q. What was her appearance on that occasion? What was her physical appearance?

A. Her face was just as it had been, it was drawn just as it had been the day before, and she was in bed at the hospital.

Q. Did she talk to you or did you talk to her?

A. I talked to her.

Q. State whether or not she talked to you?

A. She couldn't talk to me, she did try to make sounds.

[fol. 121] Mr. Marley: Object to that.

The Court: Stricken out.

Q. State what she did?

A. She cried with her face twisted, and made sounds.

Q. Did you observe any use of the right arm and leg?

A. I did ask her to show me what she could do.

Mr. Marley: I object to that, your Honor, as no part of the res gestae, and too remote.

The Court: The objection is sustained. But she may describe what she did do, within your observation, in an attempt to move her arm and leg.

A. She tried to raise her arm, and did bring it up just about like that.

Q. Did you feel her hand and arm at that time?

A. Yes, and they were still just damp and cold.

Q. Now, how often did you see her for the next ten days, say?

A. Well, I saw her almost every day.

Q. How did she appear from time to time as you went back to see her, as far as her physical being was concerned?

A. Well, she seemed to get a little better while she was there in the hospital; I was able to understand her slightly before she left the hospital.

Q. Did you observe her in eating anything while she was at the hospital?

A. The things that they brought her were in liquid form, and I have seen her use that glass tube and swallow through a little glass tube they put in soups and broths and things of that sort.

Q. Do you know how long she remained in the hospital?

A. About eight or nine or ten days.

Q. Then, what was done to her?

A. She was taken to her home.

Q. And where was that?

A. Out on Harrison Street, 4825 Harrison.

Q. Were you there when she was removed to her home?

A. No.

Q. How long after her removal out there was it until you first saw her?

A. Within two or three days.

Q. What was her physical appearance on that occasion?

A. She seemed to be able to talk a little better, and to move—and was beginning to move her arm a little better than she had the first few days.

Q. How often did you see her from that time on—strike that out—where was she when you went out and saw her at her home on that occasion, was she sitting up or in bed? [fol. 122] A. She was in bed.

Q. Do you know how long she remained in bed at her home?

A. Oh, she remained in bed several weeks.

Q. And about how often did you visit her during that period of time?

A. Oh, at first when we first went home, I was there two or three times a week, but my visits became more infrequent.

Q. What, if any improvement did you observe in her from time to time as you would make these visits?

Mr. Marley: You mean apparent improvement?

Q. Yes, apparent improvement.

A. She apparently was more able to talk and began to get more use to her right arm and leg, seemed to use them a little better. After a few weeks she was able to by holding on to the dresser and the walls to go——

Mr. Marley: I object to that, your Honor, as a conclusion of the witness.

The Court: Sustained.

By Mr. Chilcott:

Q. You can only state, Mrs. Johnson, what you saw her do, and how she appeared to do it. Just state now, what you saw her do, and how she appeared to do it in regard to walking.

A. Well, after a few weeks, she would unassisted go to the bathroom by means of holding on to the wall and the dresser.

Q. What did you observe, if anything, in regard to the way she carried herself, and her gait as she would go to the bath room?

A. Very slowly, seemingly with effort and dragging her right leg and foot, toe kind of in like that (illustrating) almost dragging them along.

Q. State what you observed, if anything, in the way she would use her right hand?

A. She would lay it on something but seemed unable to clutch it. It was a long time until she got down to where she could take hold of anything; she seemed to have no grip in her hand.

Q. Now, what, if anything, did you observe at that time in regard to her speech?

A. Her speech was still as though it were twisted.

Mr. Marley: I object to that; that is not responsive to the question.

[fol. 123] Q. Just state what it sounded like when you heard her talk and how she would move her face when she would attempt to talk?

A. When she talked, the right side of her mouth would seem to draw down, and the sound come out of the left side of her mouth in an abnormal manner——

Mr. Marley: Object to that part, in abnormal manner.

The Court: The words, "Abnormal manner" will be stricken out.

A. In such a way that it was not clear, you would have difficulty,—it was slow, and it wasn't as audible as it should be, you would have difficulty in knowing unless you were around her a great deal what she said.

Q. Now, what did you observe, how was her demeanor; did you observe any evidence of her nervous condition at that time?

Mr. Marley: Object to that, your Honor, as a conclusion of the witness.

The Court: Sustained.

Mr. Chilcott: Mrs. Johnson, what did you observe in regard to her composure when you would visit her on these occasions?

A. She cried so easily; she talked in a [melancholy] way——

Mr. Marley: Object to that.

Mr. Chilcott: You must state what she said and done that indicated to you it was melancholy, and not your conclusion. You can't tell your conclusion.

A. Well, every time I would talk to her, encourage her, she would start crying.

Mr. Marley: Object and move to strike it out.
The Court: Overruled.
Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle H. Johnson vs. New York Central Rail-
[fol. 124] way Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. What did you observe in talking with her as to what her spirits were like?

Mr. Marley: Object to that as incompetent, a conclusion of the witness, as to what her spirits were like.
The Court: Sustained.

By Mr. Chilcott:

Q. What did you observe in your conversation with her in regard to her articulation of words and continuity of speech?
A. She would begin a sentence and apparently lose her thought and stop and begin another sentence on an entirely different subject.
Q. How long did that condition continue?
A. It still continues.

Mr. Marley: Move to strike out that as a conclusion of the witness, involving the assumption that she watched her all the time, right through.
The Court: Overruled.
Mr. Marley: Exception on it.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.)

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway [—]

By Mr. Chilcott:

Q. Now Mrs. Johnson, you know of any musical instruments that the plaintiff did play, manipulate, before she was injured?

The Court: She has gone over that, describing everything down to a jew's harp.

By Mr. Chilcott:

Q. What difference, if any, did you notice or do you notice now Mrs. Johnson, in regard to the plaintiff getting around, and talking, and handling her hands and arm as compared to the way she was before she was injured?

Mr. Marley: Object as a conclusion of the witness.
[fol. 125] The Court: It is too general in its scope. Objection sustained.

By Mr. Chilcott:

Q. What did you observe in regard to the way she handles her right arm now and hand?

A. She seems to have to move it very slowly and seems to have no clutch in it. She lays her hand on something like this, and she doesn't seem to be able to clutch her fingers, to have any response in her fingers.

By Mr. Chilcott:

Q. What have you observed, if anything, at the present time, in the way she handles her right foot, and limb?

A. In trying to walk, she drags her right, with her toe sort of turn in, and dragging under; she doesn't simply lift it.

Q. How long have you observed her to be in the condition that you have now described in those regards?

Mr. Marley: I object to that as again too broad. I don't know just what he means by that.

The Court: Re-state the question.

(Question read as above recorded.)

The Court: You mean in regard to the arm and hand and leg?

Mr. Chilcott: Yes, sir.
The Court: Overruled.
Mr. Marley: Note the exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there in open court excepted and stil excepts.

To which action and ruling of the court the defendant, in the case of Myrtle J. Johnson, vs. New York Central Railway Company, by its counsel, then and there in open court excepted and still excepts.

A. Up to the present time, today?

By Mr. Chilcott:

Q. What have you observed in regard to her weight at the present time in regard to, or as compared to, what it was before she was hurt?

[fol. 126] Mr. Marley: I object to that; I think the plaintiff, being in evidence, her weight could be given accurate by the weighing on the scales, without the witness undertaking to guess at it.

The Court: Her observation. Objection overuled. Observation may be made by eyes or scales or either way.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel then and there at the time excepted and still excepts.

A. She was a heavy set girl before, and she is little and thin now.

By Mr. Chilcott:

Q. Now, Mrs. Johnson, in counsel for the defendant's opening statement—what was her general nervous condi-

tion as far as you observed and prior to this injury and accident?

Mr. Marley: Object, incompetent, a conclusion of the witness and she is not fully qualified to testify as to nervous conditions. Nervousness is not something you can judge entirely by appearance, your Honor.

The Court: Objection is overruled in view of the opening statement of defendant's counsel.

Mr. Marley: Note exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there in open court excepted and still excepts.

To which action and ruling of the court the defendant, in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

A. She had all the appearance of being a normal, robust, energetic, healthy person.

[fol. 127] By Mr. Chilcott:

Q. Did you ever at any time prior to this accident observe anything that was extraordinary in regard to her nervous appearance?

A. No.

Mr. Marley: I object to that, your Honor, incompetent, a conclusion of the witness.

The Court: Objection overruled.

Mr. Marley: Note the exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. No.

Mr. Chilcott: You may inquire.

Cross-examination.

By Mr. Marley:

Q. Now, Imogene, Doctor Marie Esmond, is your sister, isn't she?

A. Yes, sir.

Q. And it was your sister that met you at the depot at that time?

A. Yes.

Q. Now, I believe you say that you and your sister-in-law went from San Francisco about that time?

A. Latter part of August.

Q. 1925?

A. Yes.

Q. And it was a sight-seeing trip too, wasn't it?

A. Yes.

Q. And, of course you took in everything you could during your trip, didn't you, to see everything you could?

A. Everything we had time for.

Q. That is what I say; everything you could see. Well, you kept late hours, didn't you, stayed out just as long as you could and went just as far as you could; I mean in going around different places?

A. Well, we attended the convention.

Q. I know, but you said you went to the Grand Canyon, for instance?

A. Oh, yes.

Q. Now did you try to go down the canyon there?

A. Oh no, no.

[fol. 128] Q. You got off at Williams, was it, and went over on that line?

A. I believe that was it.

Q. And how long were you there?

A. Just the day; we didn't stay all night.

Q. Did you walk around over the canyon there, over to different points?

A. Not over the canyon, we just walked around the hotel and saw the little town.

Q. You didn't stay all night there then, did you?

A. No.

Q. What time did you leave the canyon to go back to the Santa Fe junction?

A. I really couldn't say.

Q. About what time?

A. I couldn't say what time.

Q. Was it late in the evening?

A. I just don't remember.

Q. Now, then, what time did you take the train from Williams on West, what time of the evening was it?

A. I don't remember.

Q. You don't remember that. Now then, you remember what time you went to bed that night?

A. Probably late in the evening.

Q. Was it eleven or twelve o'clock at night?

A. I know it was late in the evening, because we—

Q. It was about eleven or twelve o'clock at night, you think?

A. I don't think it was around twelve, I think it was probably ten thirty, I don't remember.

Q. You don't remember. Now, when you left Williams to go to Los Angeles, did you go on through, or did you stop off?

A. We went on to Los Angeles.

Q. Now, you got to Los Angeles the next afternoon, wasn't it?

A. I believe so.

Q. You remember that?

A. I couldn't say exactly.

Q. Do you remember whether you got there in the morning or afternoon?

A. I haven't thought of all that. I have to think about some things.

Q. Just what is your recollection now. Do you remember was it in the afternoon when you got to Los Angeles?

A. No, it was in the daytime; a girl friend met us down at the station.

Q. Then you met your brother George there, did you?

A. He did not meet me at the station.

Q. Did you go to the hotel?

A. No, went to this girl friend's.

Q. To your girl friend?

A. Yes, sir.

[fol. 129] Q. And how long did you stay at your girl friend's?

A. Oh, we stayed two or three days.

Q. Then, while you were there at your girl friend's were you running around visiting different points of Los Angeles?

A. Yes, sir.

Q. Going down to San Pedro and all those places?

A. No, sir.

Q. What places did you visit?

A. We visited the beaches more than anything else.

Q. Did you go down to Long Beach?

A. Yes.

Q. Did you go up to Santa Monica, any of those places?

A. I don't think we went to Santa Monica.

Q. Glendale?

A. No, sir.

Q. While you were there visiting these places, did you climb any of the mountains afoot?

A. Not there, no, we weren't there long enough.

Q. You didn't go to Mount Hope or Mount Lowe?

A. No.

Q. What time did you go to bed the night while you were visiting your friend; what time in the evening?

A. Usually about our usual time around eleven or twelve.

Q. And when you got up in the morning, would you commence going around sight-seeing again?

A. Yes.

Q. I believe you say she weighed at that time about 160 pounds?

A. Yes.

Q. Then when you left your friends did you go to your brother George's?

A. We visited with him.

Q. Did you stay at his house at all?

A. Didn't stay at his house, he didn't have accommodations for us.

Q. You didn't stay at his house; that is what I am getting at?

A. No, sir.

Q. What train did you leave out of Los Angeles for San Francisco?

A. We took the boat.

Q. You went down to San Pedro to get the boat?

A. It was out of Los Angeles.

Q. That is where they take the boats. Did you set up on the boat that night?

A. No.

Q. Went to bed early?

A. Yes, we were very tired.

Q. You were very tired?

A. Not unusually tired.

Q. But you were very tired. Now, what time did you get to San Francisco?

A. Next day.

Q. What time, morning or afternoon?

[fol. 130] A. Next morning, I think it was around nine or ten o'clock in morning.

Q. In the morning?

A. Yes.

Q. Then where did you go when you got there?

A. Went to the Palace hotel.

Q. Went to the Palace hotel. Was that association in convention at that time when you arrived there?

A. Yes.

Q. Did you go immediately down to the convention?

A. Yes.

Q. Now, do you know what day of the week it was you got to the convention?

A. No.

Q. You don't know the day of the month either, do you?

A. No.

The Court: Mrs. Johnson, answer out loud, the reporter has to hear your testimony.

Q. When you got to the convention, did she undertake to give any demonstrations at all?

A. Yes, sir. *A.* She was there for the purpose of the convention, but the Nesles' wish to have them make a demonstration, because she was the very best operator she had.

Mr. Marley: Your Honor, I move that be stricken out.

The Court: That part will be stricken out, beginning with "But the Nesles etc."

Q. Now, she did quite a good deal of demonstrating there, did she not?

A. Not a great deal.

Q. She worked very hard there the while she was there?

A. You have to work quickly while you are doing it.

Q. And use a great deal of energy, don't you?

A. Yes.

Q. How long did she work the first day you got to the convention that way?

A. I don't think she was on the—I don't think she was demonstrating the first day.

Q. The first day did you and she go anywhere sight-seeing around San Francisco?

A. Oh, my cousin was there at the Palace Hotel, and took us for a ride.

Q. Where did you go, out to the Sutro Baths, out that way, through the park?

A. I believe it was.

Q. Did you go down to the Presidio?

A. You know how hard it is to remember those places when you are in a strange place.

[fol. 131] Q. Did you do any walking that day around through the different places?

A. Not that day.

Q. Were you out at the Cliff house?

A. Yes.

Q. Where you look at the seals on the seal rocks?

A. Yes, sir.

Q. Did you climb up and down that hill there?

A. Yes, sir.

Q. You and she?

A. Yes.

Q. How long were you out there by the Cliff House?

A. Isn't there a place where you have a little lunch there?

Q. They have pretty near everything.

A. And we were out at lunch; had a little lunch and coffee.

Q. Now, when you left there, about what time of the day was it?

A. I don't know.

Q. And from there where did you go?

A. Back to the hotel.

Q. Do you remember what time you got to the hotel that evening?

A. No.

Q. Was it as late as ten or eleven o'clock?

A. No, we got back for dinner.

Q. Then after dinner where did you go?

A. They had these booths and things at the Palace Hotel for this convention, showing the different permanent waving machines and all those different things, and the things that she was connected with in her business.

Q. And she walked around the various booths?

A. Yes, sir.

Q. And there was a good many of those there in the hotel?

A. Oh, yes.

Q. And how long was she walking around visiting those booths?

A. All evening, and visiting the different people we knew, that we had met before.

Q. Now then, about what time did you leave to go to the hotel and sleep?

A. We were in the hotel.

Q. I mean, what time did you go to your bed at the hotel and sleep?

A. Probably eleven-thirty.

Q. Eleven thirty to twelve o'clock wasn't it?

A. Yes.

Q. Now, what time did you get up next morning?

A. Oh, we usually slept late.

Q. When you got up that day, where did you go to, first thing in the way of sight seeing. You went sight-seeing, didn't you?

A. Well, I don't know whether it was that day or not, I know one day we went out to Golden Gate Park.

[fol. 132] Q. Now then, did you walk any that day?

A. At Golden Gate park?

Q. Yes.

A. Oh yes, we walked all over the little Japanese garden.

Q. And how long were you out there walking around?

A. All afternoon.

Q. Now, when you got through walking around that afternoon, where did you and she go?

A. Back to the hotel.

Q. Did you take a street car?

A. We did that day.

Q. Now, what time did you get to the hotel, do you remember?

A. No.

Q. Was it at supper time?

A. Yes.

Q. Now, after supper, what did you do, did you go sightseeing again that evening?

A. Let's see. One evening we took a walk toward China Town, but we thought we better not go down there, and we walked around and come back.

Q. Did you go up toward Knob Hill?

A. I think—my cousin drove us up there.

Q. And then did you walk down the hill toward China Town?

A. We started down there, but we were afraid to go.

Q. How far did you walk that time, and about how long?

A. Oh, really, I couldn't say.

Q. Well, what time did you get back to the hotel then?

A. Oh, I don't know.

Q. As a matter of fact, Mrs. Johnson, you were walking around sight-seeing all the time, weren't you?

A. Well, we were around walking or riding.

Q. And you did a great deal of walking, didn't you?

A. Yes.

Q. Now, that night, did you go to the Palace Hotel to visit the booths again?

A. Yes.

Q. And how long were you visiting the booths at that time?

A. You say visiting the booths. We were talking to people there from Kansas City, around the booths, and around in the halls.

Q. And walking around visiting?

A. Yes.

Q. Now, how long did you stay there that evening?

A. All evening.

Q. The whole evening?

A. The whole evening, yes.

Q. Now, what time did you go to bed that night?

A. I couldn't tell you.

Q. Do you know what time you got up next day?

[fol. 133] A. I know we always went to bed around late in the evening, and got up late next morning.

Q. And each day you went sight-seeing?

A. More or less.

Q. Now, how long were you there?

A. I couldn't say, it was around a week, I really couldn't tell you.

Q. And you were sight-seeing all that time?

A. Yes, more or less.

Q. Now, when you left there, did you take the Union Pacific, or which way did you go?

A. When we left?

Q. To Chicago?

A. My cousin and his wife took us to Sacramento, and we visited them there.

Q. Did you go in a machine or on the boat?

A. In his car.

Q. In the machine. Now, how long were you in Sacramento?

A. I don't know exactly, we took several little trips, you see, we drove to Tucson, Arizona, and Reno.

Q. Now, in making those trips, did you do a good deal of walking, you and your sister, Mrs. Johnson?

A. We couldn't do a good deal of walking while riding across mountains in a car.

Q. Did you get out and walk around, or did you stay in the car all the time?

A. If you are in the car riding through the mountains, it makes you kind of lazy, and you do stay in the car a great deal.

Q. Now, when you left there, where did you go?

A. Let's see, we took the train. After we left my cousin's at Sacramento, we took the train and went to Victoria and that was before we got to Vancouver—no, Seattle.

Q. Did you go over what you call the Mount Shasta route, up the coast?

A. I believe that was it, by train to Seattle.

Q. Now, how long were you in Seattle?

A. I believe a day and a night.

Q. Did you do any sight-seeing and visiting there?

A. No, we shopped around and they were opening a new store, I remember, and we went to the opening of this new store.

Q. You and she walked around all the time, walking instead of riding in a machine?

A. We walked in Seattle, yes.

Q. Then when you left Seattle, where did you go?

A. Went to Victoria. I got kind of mixed up.

[fol. 134] Q. You went to Victoria and Vancouver both?

A. Yes, sir.

Q. When you were there, did you visit around and walk around a good deal?

A. We went swimming in Victoria. We didn't stay over there. Victoria was first. We went swimming there, and we went on to Vancouver that night.

Q. And did you ride around in a machine? Or, did you walk around most of the time?

A. Let's see, in Vancouver, we hired a car in Vancouver and rode.

Q. Now, how long were you in Vancouver, you say?

A. Oh, I don't know, I think a day.

Q. Then when you left Vancouver, where did you go?

A. To Banff,—no to Lake Louise first.

Q. That is on the Canadian Pacific?

A. On the Trans Canadian, isn't it?

Q. Through Canada?

A. Yes.

Q. Did you stop at Lake Louise?

A. No, we stopped, but we didn't stay.

Q. How long were you there?

A. Most all day.

Q. Lake Louise is right up there in the mountains?

A. Yes, sir.

Q. Did you and she walk around a good deal that day, looking around sight seeing?

A. There isn't a great deal of walking places. You have to have hiking clothes, and all that.

Q. Did you do any walking at all that day at Lake Louise?

A. Just around the hotel on the grounds.

Q. Didn't try to climb those mountains?

A. No, sir.

Q. When you left Lake Louise, where did you go?

A. To Banff.

Q. How long were you there?

A. Couple of nights or days.

Q. Were you sight-seeing then?

A. Yes.

Q. Did you walk around there?

A. Did more walking there than any place.

Q. Did more walking there than any place?

A. Yes.

Q. Any mountains there?

A. Well, they are not bad, there are paths with falls and pretty places.

Q. You have to do a great deal of climbing to get around?

A. No, sir; there is some few steps you make. It is all laid out for tourists, and you can walk around through these paths and they have these steps.

[fol. 135] Q. And you go up these steps?

A. Yes, but they are not bad.

Q. Yes, but you go up the steps, don't you? You were there you say how many days?

A. I don't remember.

Q. During the entire time you were there, you visited around and walked around?

A. Yes.

Q. And she was walking with you all the time?

A. Yes.

Q. When you left Banff, where did you go?

A. Direct to Chicago.

Q. Did you come down by way of St. Paul?

A. I believe it was.

Q. When you got to Chicago, you went right on through to New York?

A. Yes, several hours between.

Q. You took the New York Central, you say?

A. Yes.

Q. Do you remember what train you took?

A. Going to New York?

Q. Yes.

A. New York Central is all I remember.

Q. You don't remember whether it was the Twentieth Century Limited or Empire, or what?

A. I don't remember.

Q. Can't tell?

A. I don't remember.

Q. Now, you got to New York in the morning or afternoon?

A. I really don't remember.

Q. When you got to New York, where did you go?

A. Pennsylvania Hotel.

Q. Now, going from Chicago to New York, did you sit up at night rather late in the club car?

A. We never can go to sleep early, and we sit up as late as we could.

Q. Do you think you sat up until eleven or eleven thirty that night?

A. Yes.

Q. And when you got to New York, you say you went to the Pennsylvania Hotel?

A. Yes.

Q. Did you go that same day over to this Nestle Company's place?

A. I think we did, but I couldn't say for certain, but I believe we went the same day.

Q. Then did she go or did she commence working there at that time, I mean as soon as you got there that day?

A. No, we had some work done ourselves the first day we were there, I couldn't tell the first day we were in New York, but we had some work done, and talked to Mr. Nestle. [fol. 136] Q. You went over there?

A. Yes.

Q. Now, did you stay with her while she was there learning to use this machine?

A. Yes.

Q. Do you know how many hours a day she would put in there?

A. Oh, we were there several hours, two or three or four, something like that.

Q. And she would be operating this machine all that time, would she?

A. Oh, no.

Q. What would she be doing?

A. We would be looking at different machines, and talking over this machine and other machines, there with Mr. Nestle and his man.

Q. Now, when you would leave there, did you go shopping at all?

A. Yes.

Q. And you took in all the stores there?

A. Yes.

Q. You were walking then?

A. I kept going out to Nestle's.

Q. I mean through the stores, you were walking around through the stores?

A. Yes, sir.

Q. Do you remember at any time while you were there of her being dizzy in any of these stores?

A. No.

Q. You have no recollection of that?

A. No.

Q. Now, after the stores would close, and you would go back to the hotel and stay all night, or where would you go?

A. We would always go back to the hotel and dress and make plans what we would do that evening.

Q. The first evening you got there, what did you do?

A. I don't remember what we did.

Q. What places, if any, did you visit that night?

A. I don't know. Which night?

Q. The first night you got there, I am talking about now.

A. Well, I called a friend of mine who is connected with my business in New York.

Q. Where did you go—what I mean, did you go to any of the theatres or take in any sights?

A. This friend of mine took us out to a late supper. We were late getting around, and he was late getting from his work, and he took us to a late supper.

Q. Now, did you do much walking around that evening?

A. Just strolling there on Broadway.

Q. What time did you get back to the hotel that night?

A. Oh, I remember we were quite late that night.

Q. Was it as late as twelve o'clock?

A. Yes.

Q. Between twelve and one, was it?

A. I suppose it was. New York, when you are in New York, you lose sight of time some way, it is so light, it is as light as day-time.

[fol. 137] Q. The second day did you go back to Nestles and she study again a few hours?

A. We went back and visited and talked. I don't think she did anything with any of the machines except to talk about them.

Q. Then did you visit any place that night, that afternoon?

A. We were around Nestles that day. We would get up so late, in the morning, we were at Nestles in the afternoon.

The Court: Gentlemen of the jury, during recess of the Court, you will not discuss this case among yourself, or permit any one to discuss it with you, nor will you form any opinion until the case is finally submitted to you. The Court will stand at recess until 1:30 o'clock p. m.

(Whereupon at 12:00 o'clock noon, a recess was had until 1:30 o'clock p. m., same date, to-wit February 21, 1927.)

After Recess—1:30 p. m.

The Court: You may proceed, Mr. Marley, with your cross-examination.

By Mr. Marley:

Q. Let's see. We hadn't left New York City yet, had we?

A. No, sir.

Q. I believe you say that while she was in the store in New York City she didn't manifest any dizziness, as far as you knew?

A. No, sir.

Q. Did you ever know of her manifesting any dizziness at any store on this trip, anywhere?

A. No.

Q. Now, the second night there, did you go out at night or did you go to the hotel?

A. We went out for a while every evening; went strolling, or some evenings we went to the theater. I remember we

saw "Sonny," I think it was, Marilyn Miller in "Sonny" one evening.

Q. And you were walking around quite a good deal there those evenings, were you not?

A. Well, the Pennsylvania hotel is in the theater district and in the downtown district; that is where we were. We didn't go beyond that district.

Q. You didn't go anywhere outside of that central district, then?

A. No, not to walk.

Q. How late at night was it before you went to bed?

[fol. 138] A. Well, we always went to bed, as I told you, rather late. We slept late in the morning and we weren't sleepy early in the evening.

Q. Now, when you were downtown there shopping, looking around, you were walking all the time, weren't you?

A. More or less, just as we would do at home.

Q. And you were there about, say, five or six days?

A. Yes, five or six.

Q. Then during that entire time to make it briefly, you did about the same thing every day, didn't you.

A. Just about.

Q. Now, then, when you left New York City where did you go first, you say?

A. We went to Nyack, New York, to visit a girl friend of mine.

Q. Did you go on the train or by automobile?

A. We went by ferry and then by train.

Q. Then by train.

A. Yes.

Q. Now, what time did you get to Nyack, about?

A. About 7:30; around in there. It was in the evening, at dusk.

Q. In the evening.

A. Yes.

Q. Did you go visiting anywhere that evening at all, or sight-seeing?

A. We took the taxicab from the train right up to the club where our girl friend met us, at the club.

Q. Now, when you were to the club house did you stay there all evening?

A. Oh, we stayed until late in the evening before we retired, and we retired right there at the next house. There is several buildings.

Q. And you were up late that night, were you?

A. As we always are.

Q. That is what I am getting at; the usual time?

A. Yes.

Q. Now, then, did you do any walking that evening, or going around sight-seeing at all?

A. No.

Q. Just sat around the club?

A. You see, it was dark and we sat around this club house with a group of people that belonged to the club, and talked, until they had a little supper, late, and we had a little supper and then walked to the next house where we went to bed.

Q. At that time, in those suppers, did you smoke any cigarettes at all; any of you?

A. No.

Q. None of you?

A. No.

[fol. 139] Q. Now, then, when you got up the next morning where did you go?

A. Let's see. We visited the gymnasium of the club and their pool—it was outdoors there. It is all right in a group of buildings.

Q. Well, did she exercise in the gymnasium at all; anything of that kind?

A. Oh, no.

Q. Did she go swimming at the pool at that time?

A. No.

Q. Well, did you do much walking around that morning at all?

A. No. You can't. It isn't large enough. It is just a group of buildings.

Q. Now, then, did you stay there all day?

A. Yes.

Q. Or what time did you leave there?

A. We stayed there until time to take the ferry to go across to Tarrytown, New York, where we had to catch a suburban that would connect with the New York Central at Harmon, and it would be a difference, I imagine, of—I

couldn't say exactly, but I suppose from the time we would leave our friends there would be a difference of an hour until we would catch the New York Central; an hour or a little more.

Q. All right. Now, then, did you have your grips with you at that time?

A. Surely.

Q. And did you folks carry the grips, or somebody carry them for you?

A. We each carried our own.

Q. You each carried your own?

A. After we left our friends.

Q. That is what I mean.

A. Yes.

Q. Now, then, you say you went then to Nyack—or from Tarrytown where did you go?

A. We went to Tarrytown from Nyack on the ferry.

Q. Yes. Now, then, from Tarrytown where did you go?

A. We caught a suburban train that connects with the New York Central at Harmon, because the New York Central doesn't stop at——

Q. I know; Harmon is the first stop, and it only stops to take on passengers?

A. Yes.

Q. Now, then, you two were going alone at that time, were you not?

A. From the hour before when we left our friends until we got the New York Central; something like that. I couldn't say exactly an hour.

Q. But you went by train all the way to Harmon?

A. No, we went across on the ferry.

[fol. 140] Q. I know, but what I mean is—don't misunderstand me, now; I don't want to confuse you—you went on the ferry until you got over, but then you took a train?

A. Yes.

Q. A surburban, we will call it.

A. Yes.

Q. Over to Harmon.

A. Yes.

Q. You didn't go in any other way?

A. Oh, no.

Q. You didn't walk or take any automobile, anything of that kind? That is what I mean.

A. No, sir.

Q. Now, then, how long did you wait for the train at Harmon?

A. About 20 minutes, I imagine. I couldn't tell you exactly, because I didn't have a watch on.

Q. Well, I just wanted it generally.

A. Yes.

Q. Now, then, when you started to take the train did anybody assist you and Myrtle to the train?

A. There wasn't anyone there since, no——

Q. I know, but I meant anybody, a red cap, for instance, or a nurse something of that kind.

A. No. We were carrying our own things.

Q. You were carrying your own things right all the way through?

A. Yes, sir.

Q. Now, when you got on the train I believe you said you put your grips in your berth, or seats, and then you went and got ready for supper?

A. On the New York Central; yes.

Q. Yes. I am assuming now you got on at Harmon.

A. Yes.

Q. And then you washed up and went to supper, and you then went to the club car, did you?

A. After we had supper.

Q. Yes, that is what I say; you went to the club car.

A. We came through the car from the diner, through our car.

Q. Into the club car.

A. Yes. Got a deck of cards out of our grips. We had left our coats before we went to the diner.

Q. I know, but I don't care for that.

A. And went right on [our] to the club car; but you see, that was rather late.

Q. Yes. Now, when you got to the club car you say you played rummy?

A. Yes.

Q. Just you two together?

A. We started playing rummy; we two.

Q. Did anybody join you afterwards?

A. Yes, sir.

Q. Who joined you after that?

[fol. 141] A. There was a gentleman sitting on the arm of the seat across the aisle watching another game, and——

Q. Well, he joined you, didn't he?

A. —the club car was full——

Q. I know, but he joined you, didn't he?

A. He asked if he couldn't get in the game.

Q. That is it; he joined you in the game.

A. Yes, sir.

Q. Now, what I am getting at, did any other man join you in that game?

A. No, sir.

Q. That is just the only one?

A. Yes, sir.

Q. Now, that was about 7:30 or 8 in the evening, wasn't it?

A. No, sir, it was half past eight or nine or ten before this gentleman joined us. It was late. No, it was—let me see——

Q. Now, let me understand you. I want to get it correctly, Imogene.

A. All right.

Q. You washed up—you got on the car at Harmon about 6:30?

A. Yes.

Q. Now, you washed up and then went in the diner.

A. Yes.

Q. What time did you get in the diner?

A. We were very late. There was hardly a soul in that diner when we went in there.

Q. Well, was it as late as eight o'clock?

A. Well, no, it wasn't as late as eight.

Q. I want to know what time you got in that diner.

A. I couldn't tell exactly, but I suppose it was around seven-thirty.

Q. All right. Now, then, how long were you in the diner?

A. Well, we were hungry, and we had a lovely dinner.

Q. I know, but how long were you in the diner?

A. As long as a person would take up to fool over a nice dinner.

Q. Give me your best judgment; that is all I am asking.

A. It was quite awhile. We didn't know what to do with ourselves.

Q. Was it an hour?

A. Oh, all of that.

Q. You said you did what, eating so much?

A. Well, we just had time to kill; we weren't sleepy.

Q. Then when you left the diner I believe you said you went right into the club car, didn't you, then?

A. Went back through our car and got our cards.

Q. That would put you in the club car about eight-thirty or nine o'clock, wouldn't it?

A. Well, it would be every bit of nine o'clock?

[fol. 142] Q. Nine o'clock?

A. Yes.

Q. Then you commenced playing rummy?

A. Yes.

Q. Then you played, then, until between eleven-thirty and twelve?

A. Yes, late. I couldn't tell exactly.

Q. Everybody else had gone to bed but just you?

A. Yes.

Q. Did this gentleman stay and play with you until you——

A. No, he left.

Q. He left, and the two of you played alone?

A. Yes.

Q. Now, then, did anybody smoke any cigarettes while you were playing cards there at all?

A. I suppose the gentleman did.

Q. Yes; nobody else?

A. No.

Q. Now, then, when you went into the sleeper where your berth was, weren't you and Myrtle just laughing and kind of talking and laughing as you went along towards your sleeper?

A. Oh, I suppose, when we would be opening doors, and things like that, we would say things to each other. I don't remember particularly.

Q. Now, you finally got to your berth, lower 8 in car 64?

A. Yes.

Q. Now, did you observe the berth before you had any fall at all? Did you look at it to see what kind of a berth it was, or——

A. Well, not particularly, Mr. Marley.

Q. You weren't interested, were you?

A. We had been traveling so much.

Q. I know; you weren't interested, were you? You just went along——

A. We wanted to get home.

Q. I know, but you went along in just the usual way, didn't you?

A. Yes.

Q. Now, I believe you say that you were sitting on the edge of the berth, was that right?

A. Yes, sir.

Q. That would be making you look across the aisle, wouldn't it?

A. No, it would be making me look toward the foot of my berth.

Q. Oh. Then, as I remember, you were sitting kind of on the arm of the seat?

A. No, sir, I was sitting on the berth with my back braced against the arm of the seat.

Q. You were sitting on the edge?

A. Yes.

Q. And she was standing by the foot of the berth, was she; towards the foot, looking towards you?

A. Not quite. I was just about like this—I just have to show you to tell you—I was about like this. The arm [fol. 143] was there, and I was just about like that, with my leg in the aisle, like that.

Q. About that position?

A. Yes.

Q. That is, you were sitting inside the berth in a way that one hip rested against the arm of the seat; of the front seat?

A. No, I wasn't against that arm. I was just about like this, with my leg braced in the aisle.

Q. What I am getting at, your body was inside the berth, wasn't it?

A. It was just on the edge. I was sitting on the edge, like you sit on the edge of anything, with one leg almost entirely off.

Q. Well, the chair is hardly the way the berth would be. Now let me understand. You say here is the berth like this; this is just parallel with your side here.

A. Yes.

Q. Now, when you were sitting, you were sitting——

A. This is just the way it was, and we were going this way.

Q. Now, which end of the berth did you say you were sitting on?

A. I was sitting near the head of the berth.

Q. The head of the berth?

A. Near it.

Q. When you sat at the head of the berth that threw your left hip, didn't it, against the front seat of the berth?

A. No.

Q. It didn't? Which hip did it throw?

A. When do you mean?

Q. Well, now, here is the berth, like this. This is the berth here like this and you were sitting like this. Wouldn't that put your left——

A. I was sitting on my left—we were going toward the west, you see.

Q. Well, what I am getting at is you were facing the rear of the car, weren't you?

A. Yes.

Q. That is what I am getting at. Now, when you faced the rear of the car like this, and here is the berth——

A. The rear of the car is toward the east, Mr. Marley.

Mr. Wickersham: Try and have it in the direction of the court room here.

By Mr. Marley:

Q. This is the rear of the car here.

A. No, that isn't. That is the engine, going towards the west. We were coming home.

Mr. Wickersham: The confusion is by turning her around.

[fol. 144] By Mr. Marley:

Q. What I am getting at is this: Here is a car of an east bound train. Here is the aisle in that car.

A. But it is a west bound train.

Q. I mean a west bound train. Now, there you are. Now, you were sitting, you said, to that end of the car, weren't you—the front end of the berth?

A. Yes, but I wish you would turn it so it would go to the west.

Q. Well, I can only show it by the diagram here, Imogene; that is all I can do, child.

A. You can make your diagram face the west just as easily as you can some place else.

Q. Now, wait a minute, Imogene. I will get it right there. This is facing the west now. Here is the west, and here is the front seat like that. Now, what I am getting at is, you were sitting here with your feet out in the aisle?

A. I had my feet in the aisle, yes, sir.

Q. Now, when you had your feet in the aisle your body was sitting on the berth, was it not?

A. It was on the berth; yes, sir.

Q. Then if that was the case, which one of your hips was against the edge of the seat? That is what I am getting at.

A. My hip was laying over the seat; was on over. I was hanging with my right leg into the aisle like that.

Q. And here is the back of your seat, like this.

A. Coming out like this.

Q. Then you were resting this way?

A. I wasn't resting. I was just sitting here with my foot braced in the aisle.

Q. I know, but, Imogene, weren't you resting against this?

A. No. It was back of me.

Q. You were not touching it at all?

A. No, I wasn't.

Q. That is what I want to know. Now, then, at this time where was she standing with reference to you while you were sitting in that position?

A. She was looking at me and talking to me, and standing in the aisle.

Q. I know, but was she standing between you and the front of the train?

A. No, she was standing toward the front of my berth.

Q. And you were looking towards the rear?

A. The pillows of the berth were toward the engine, you understand.

Q. I know. I understand that.

A. The pillows were in the side back of me.

Q. I know; towards the head of the train.

[fol. 145] A. Yes; and she stood in the aisle toward the foot of the berth facing, partially facing me, and facing the way that we were going.

Q. That would be facing west.

A. Facing the engine; yes.

Q. Now, I believe you say her hand was up on the curtains?

A. She had hold of the curtains. I couldn't tell you just exactly how, but clutching several folds of the curtains.

Q. Now, just with her hand, like that?

A. About at the partition at the foot of the berth; the partition that divides two berths.

Q. Yes. In order to make it clear, Imogene, you know they slide a board like that, don't they?

A. Yes.

Q. And this board was the partition that you are speaking about?

A. Yes.

Q. And that was the only thing that separated the two berths?

A. Yes.

Q. Now, how close was she to that partition?

A. Her body was in front of it but her hand was back just about here, braced with several folds of the curtain in her hand against this partition, a little lower then her shoulder, like that.

Q. Now, then, I believe you say when the sudden lurch came it threw her forward?

A. It swung her around.

Q. Swung her back this way?

A. Possibly holding onto the curtains would swing her around; the fact that she was trying to hang onto those curtains.

Q. She was trying to hang onto the curtain.

A. Yes.

Q. And it swung her around?

A. Yes.

Q. Then do you say she swung back again?

A. No, I didn't say she swung back again. I haven't said anything about it.

Q. Well, I am asking you if you did say it.

A. Why, no, sir.

Q. Now, let's get the next step; after she swung back did you see her head hit?

A. No, I didn't see her head hit.

Q. You didn't see anything at all, did you?

A. I just—as I went I saw her going some place.

Q. And that was all; you went and she went?

A. Yes, sir.

[fol. 146] Q. So you don't know anything about where her head struck, do you?

A. No.

Q. That is what I was getting at. Now, then, the next you knew was that you saw her down in the aisle?

A. Yes.

Q. And you helped her up?

A. Yes, sir.

Q. Now, after you and she went to sleep—could you give an idea of about when that was?

A. It was quite late. She was a long time going to sleep, and I finally went to sleep trying to fight to keep awake for her, but I couldn't.

Q. I know, but you went to sleep.

A. Yes.

Q. Then you woke up next morning about what time?

A. It was almost noon.

Q. Almost noon.

A. Yes.

Q. And you slept right on continuously from the time you went to sleep until almost almost noon?

A. Yes.

Q. Now, then, you were awakened about noon time by somebody pulling at you, I believe you said.

A. I didn't say at noon time.

Q. I said about noon time.

A. It was late in the morning. I couldn't tell you. I didn't have the time.

Q. I am not splitting hairs with you.

A. Well, it was late in the morning. We always slept late in the morning.

Q. I know. I took your word for it it was almost noon, and I am building on that.

A. Yes.

Q. Now, you say at almost noon when you woke up you felt somebody pulling at you?

A. Yes, sir.

Q. Then you made this complaint. Now, you got to Chicago, I believe, to the LaSalle street station, didn't you?

A. Yes.

Q. And there was a doctor came there and examined her.

A. Yes. He didn't examine her.

Q. I know, but he examined her; he looked at her head, didn't he?

A. Well, his examination was so disinterested and slight——

Mr. Marley: Wait a minute. I object to that, your honor, and I move to strike that out.

The Court: Objection sustained.

Mr. Marley: That "disinterested business."

Q. I want to know what was done. Didn't he look at her head, Imogene?

[fol. 147] A. He passed his hand over her head when I told him about the accident, but he didn't part her hair, look in or anything.

Q. Just passed his hand over her head like this, to feel?

A. Yes.

Q. Now, then, when he did that did he find anything?

Mr. Chilcott: I object to that.

The Court: Objection sustained.

By Mr. Marley:

Q. Now, I believe you say you looked at her head, too?

A. Yes.

Q. Now, when you looked at her head did you find a lump there?

A. Yes, sir.

Q. About how large was that lump?

A. Could I show you?

Q. Well, yes; just illustrate to the jury. We want to know your own——

A. It was sort of——

Q. Was it raised, just a kind of raised lump?

A. Yes, sir.

Q. Like about the size of a pigeon's egg?

A. I don't know about pigeon's eggs, but——

Q. Did you ever see a pigeon egg?

A. Let's see. If I can think of something——

Q. Well, a marble; about the size of one of these ordinary marbles.

A. It wasn't that kind of a lump. It was a flatter lump and spreader lump; not as high as a marble.

Q. Kind of raised about like that?

A. About that high and more spready; like that (illustrating).

Q. About that long. Now, whereabouts was that on her head, you say?

A. On the left side.

Q. Left side. How far up, do you remember?

A. About in here (indicating).

Q. Right about there. Was there any—you didn't see any dent in the head at all, in this raised lump, did you?

A. No, it was just lumped.

Q. Just lumped?

A. Just lumped.

Q. And I believe you say at that time she was quite fleshy?

A. Yes, sir.

Q. Now, then, after this doctor in the LaSalle Street station examined her head you then went over to the Van Buren street station to take the Santa Fe and came to Kansas City?

A. Dearborn, isn't it?

[fol. 148] Q. Well, I mean Dearborn. That is right. That is the Santa Fe.

A. Yes.

Q. Now, then, when you got to Kansas City I believe you said you took her to the Grace Hospital.

A. Yes, sir.

Q. Was Dr. St. Elmo Sanders there at the time, when you got there?

A. Yes, sir.

Q. Did he look at this lump, too?

A. They made a thorough examination of her, the nurses and all. I wasn't in the room at that time.

Q. You weren't in the room?

A. No, sir.

Q. So from that time on you know nothing about it except what has been told you?

A. Yes, sir, and observation when I see her.

Q. Yes; excepting when you went to visit her.

A. Yes.

Q. Now, do you remember when she quit Dr. Sanders and went to some other doctor?

A. No, I couldn't tell you exactly.

Q. Well, do you know what doctor she went to after she quit Dr. Sanders?

A. Just from hearsay.

Q. Just from hearsay.

A. Yes.

Q. Then do you remember what doctor she went to after she quit that doctor? I will put it this way——

A. I wasn't with her.

Q. That is what I am getting at. Did you accompany her at any time to see any doctor?

A. Let me see. No.

Q. Did she tell you the doctor that she went to see after she quit Dr. St. Elmo Sanders?

A. She spoke of her doctors.

Q. Did she give you their name?

A. I can't remember their names, though, really. One was at St. Margaret's hospital.

Q. That is over in Kansas City, Kansas, wasn't it?

A. Yes.

Q. Now, then, but wasn't there another doctor that she went to see before that?

A. Let's see.

Q. Did she go to see a Dr. Woody or Woods at Thirty-first and Troost?

A. She went to some osteopath or chiropractor at Thirty-first and Troost.

Q. Do you remember his name?

A. I couldn't tell you his name.

Q. You don't remember his name?
A. No.
Q. Do you know how long she was being treated by him?
A. It was a long time.
Q. A long time.
A. Yes.
[fol. 149] Q. Now, when she left him, do you know——
A. I used to take her, you know, and then pick her up; but I didn't see the doctor or go up.
Q. I know. In other words, you would just take her in your machine and drop her.
A. Yes.
Q. Now, then, after she left there didn't she go to another doctor in the Shukert building, say? Do you know?
A. Is the Shukert building on Grand avenue?
Q. Yes.
A. I believe she went to a doctor on Grand avenue.
Q. Did she tell you she was going to see a Dr. Geraughty?
A. Yes, I remember hearing her speak of that name.
Q. Now, then, after she left Dr. Geraughty do you know what doctor she went to? Did she tell you?
A. Let's see. She called—she was ill and she called other doctors, but I don't know who they were.
Q. Well, she had Dr. Krall, didn't she, one of the doctors?
A. Yes, I remember hearing the name. I didn't see him to remember.
Q. About the time she was going to Dr. Geraughty did she have any eruption of the skin at all?
A. No.
Q. Did you ever see her at a time when her skin was—showed an eruption of the skin?
A. Yes, when she was sick in bed.
Q. Sick in bed where?
A. At her home.
Q. Was that before she had been to Dr. Geraughty or afterwards?
A. It was afterwards.
Q. That is what I am getting at. Now just describe to the jury the condition of that skin as you saw it there when she was sick in bed.
A. It was like a rash.

Q. A rash?

A. Yes.

Q. Did it ever—was it all over her face, or just a part of her face?

A. Well, I think it went all over her body.

Q. Went all over her body?

A. Yes.

Q. As well as her face?

A. Yes.

Q. Did she tell you what the doctors called it?

A. No.

Q. You never heard it identified in any way?

A. No.

Q. Didn't it look a little bit as though it was a kind of a pimple and yet it wouldn't come to a head?

A. No.

Q. Didn't look that way?

A. It was more like a rash.

Q. Looked more like a rash.

A. Yes.

Q. Now, how long did she have that?

A. Several weeks, I believe.

[fol. 150] Q. Now, do you know what kind of a treatment she was given for that?

A. Well, she was given a diet.

Q. A diet?

A. As far as I know. I don't know anything about the treatment, but they gave her something cooling to rub on, because it burned her, and they gave her—put her on a diet.

Q. That you know of your own personal knowledge, do you?

A. Yes.

Q. Now then, you never saw them give her any medicine at all, then, did you?

A. No, I didn't know anything about the medicines.

Q. Well, did her hair come out at that time?

A. Let's see. She had high fever and I believe after the fever her hair came out then.

Mr. Marley: Well, I move to strike out that part, she had high fever and after the high fever, your honor. It isn't responsive to my question. I just wanted to know if the hair came out.

The Court: Well, that is part of the—Motion sustained. It will be stricken out. It isn't very far over the line, though.

By Mr. Marley:

Q. Now, then, how long was she in bed at that time, Imogene?

A. Well, I really don't know. It seemed to me, though, several weeks that she was in bed.

Q. Well, then, after she got up where did she go?

A. She didn't get up. They took her to St. Margaret's hospital.

Q. They did?

A. Yes.

Q. And how long was she there?

A. I couldn't tell you exactly. At that time I was on a vacation trip.

Q. Now, did you go to see her while she was over there at St. Margaret's?

A. Yes.

Q. And while she was there did you see them give her any treatments at all?

A. I wouldn't know what medicines they gave her or anything.

Q. Did she ever tell you whether they gave her hypodermic injections or whether they gave her medicine internally?

A. No.

Q. She never told you that, one way or the other?

A. No.

Q. Now, when she left the hospital where did she go? That is, left St. Margaret's, I mean.

[fol. 151] A. She went back to her home.

Q. Well, how long was she at home after she returned from the hospital?

A. Well, outside of—let's see. Outside of going up to Milwaukee for treatment she has been there ever since.

Q. Milwaukee?

A. She went east some place for treatment up there. Wait a minute, now.

Q. Well, you are wrong, Imogene. I will correct you. Didn't she go up to Battle Creek, Michigan?

A. Yes.

Q. Now, then, when she went up there didn't she drive her own machine?

A. No, sir.

Q. Did she have a machine at all?

A. Yes, sir.

Q. Whose machine was it?

A. It was her own machine, but another girl friend drove her up and back.

Q. All the way?

A. Yes, sir.

Q. That you know now, of your own knowledge?

A. Oh, I don't—I know what the girls told me.

Mr. Marley: Well, I move to strike that out, your honor.

The Court: Motion sustained.

Mr. Marley: I guess that is all.

The Court: Anything further of this witness?

Mr. Chilcott: Just a minute. May it please the court, I would like to go into a few more things with this witness, but we have some doctors here who are waiting.

The Court: Well, you can recall her.

(Witness excused.)

Dr. St. Elmo Sanders was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. Your full name is Dr. St. Elmo Sanders?

A. Yes, sir.

Q. How old are you, Doctor?

A. Fifty-three.

Q. Are you a regularly licensed and practicing physician and surgeon of the state of Missouri?

[fol. 152] Mr. Marley: Oh, I will admit that St. Elmo Sanders is qualified.

Mr. Wickersham: Well, I want to prove it.

A. Yes, sir.

Q. And how long have you practiced your profession?

A. Since March 22, 1900.

Q. And are you at present connected with any hospital in Kansas City, Missouri?

A. President of Grace hospital.

Q. And how long have you been president of Grace hospital?

A. Since 1916.

Q. Where is Grace hospital?

A. Ninth and Harrison, Kansas City, Missouri.

Q. How long have you known the plaintiff, Myrtle Johnson, Doctor?

A. For—oh, ever since—I don't know; maybe five or six years, maybe ten years. I am not sure.

Q. Doctor, you have in your hand certain papers. Are those the records of Grace hospital for the case of Myrtle Johnson, when she came to that hospital in the latter part of September, 1925?

A. This is the hospital record of Myrtle Johnson, who was admitted September 29, 1925, and dismissed October 9, 1925.

Q. Now, Doctor, those are the original records of the hospital?

A. As kept by the doctors and the nurses and the pathologist at the hospital.

Q. Are those papers which you have in your hand all the records of her case at the hospital?

A. Yes, sir.

Q. Now, Doctor, you may refresh your recollection, if you find it necessary, by looking at those original records; and tell us at what time she was admitted to the hospital.

Mr. Marley: Wait a minute. Your honor, he has already testified to that, both admitted and discharged; but if you are going to go into the record part I would object to it as incompetent and hearsay, because a record to be referred to must be shown that it is made by himself or somebody else under his direction.

The Court: Objection sustained. He can refresh his memory by any memorandum which he may have made or someone under his direction made.

Mr. Marley: Yes.

[fol. 153] By Mr. Wickersham:

Q. Were all of the records which you have in your possession made under your direction and orders?

Mr. Marley: I object to that as leading, your honor.

The Court: Overruled.

A. They were; yes, sir; part of them in my own handwriting and part of them in the handwriting of the pathologist and X-ray man; part of them in the handwriting of the nurses.

By Mr. Wickersham:

Q. Now, Doctor, will you please tell us, by refreshing yourself, if necessary, from those records, what examination you, as the surgeon in attendance, made of Mrs. Johnson upon her admission to the hospital?

Mr. Marley: Wait just a minute. Are you confining that, now, to what he himself did?

Mr. Wickersham: Just exactly.

Mr. Marley: That is all right.

A. I made a complete physical examination of Mrs. Myrtle Johnson on September 29, 1925.

By Mr. Wickersham:

Q. And what did you find?

A. I found that the woman had paralysis of the right side, right hand and leg, and the right side of her face.

Q. To what extent were those members paralyzed?

A. At the time she came into the hospital she couldn't stand without being supported, and her fingers moved very feebly and could not be made to move any more. The side of her face, the right side being paralyzed, the unparalyzed muscles on the other side pulled the face around toward the left, and her tongue refused to articulate distinctly.

Q. Now, then, with what ability, to make it a little more specific, was she able to converse and talk.

A. Her talking was interfered with to quite an extent, and it was very difficult to understand her, if at all.

Q. Now, then, Doctor, did you learn from her any history on which you formed your diagnosis of her case?

A. I did.

Q. What was it?

Mr. Marley: I object to that, your honor, as hearsay and incompetent. It is to be shown that this witness was familiar with the history of the famliy as a family physician or attending them in any way, and anything that she men-
[fol. 154] tioned to him at that time would be hearsay and incompetent; self-serving.

Mr. Wickersham: Well, just as a preliminary, to meet one of his objections, were you a family physician?

Mr. Marley: For her.

The Witness: I had treated her mother and I had treated several members of the family. As to whether I had absolutely treated her or not I don't remember.

Mr. Wickersham: You may answer the question.

Mr. Marley: I object to the question.

The Court: The objection is overruled.

Mr. Marley: Exception noted.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

The Court: The physician may testify as to the condition, and he may include in that the examination, including the objective as well as the subjective symptoms.

Mr. Marley: I have your honor's point. That is, if he is bearing in his mind the knowledge of the conditions of the family, having been acquainted as a family physician. He can take that into consideration as well as the other; but then, to take her own statements and history, regardless of his knowledge of the family history, I believe it would be incompetent. That is the point I am objecting to.

The Court: Well, you will omit from your testimony, doctor, any descriptions that the patient may have given you as to the nature of the accident; if any.

Mr. Wickersham: I withdraw the question, so there won't be any trouble about it.

Q. Now doctor, what did you do for her on the first day that you attended her?

A. I put her to bed and kept her quiet, and we attended to her various wants; I believe we had to——

Q. Will you let me have those papers just a minute? I will have them marked by the court reporter.

(Documents marked "Plaintiff's Exhibits 4-A to 4-R," inclusive.)

[fol. 155] Q. Now, Doctor, you have handed me the records of the hospital, plaintiff's exhibits 4-A to 4-R, inclusive. Those are the original ones of the hospital?

A. They are.

Mr. Wickersham: I offer them in evidence.

By Mr. Marley:

Q. Now, Doctor, I wish you would turn to these and pick out the ones that were kept—made out by you or made out for you under your direction.

A. All of them were made under my direction.

Q. I understand, but I think that you and I don't understand each other with reference to "under direction." Do I understand you to mean that you told somebody to go and make an x-ray and make a memorandum of it?

A. Yes, sir.

Q. And that is what you mean by "under your direction?"

A. That is what I mean; yes, sir.

Q. Then, as a matter of fact, any memorandum made as to the x-ray, the making of the x-ray and so forth, was not under your direction, but the memorandum was made under your direction, is that right?

A. Well, here is the way it is done: I simply said to Dr. Clayton, "Will you please make an x-ray and report to me?"

Q. Yes; and he made an x-ray and reported to you?

A. Yes, sir, and that is attached there.

Q. And that is his report?

A. Yes.

Q. Now, any other memorandums like that that were made at your request to report to you?

A. Yes, sir. Here is——

Q. Let's identify them. Now, this exhibit 4-A you made out yourself?

A. Wherever you find those peculiar violet writing, that is my own handwriting.

Q. Own handwriting.

A. Yes, sir.

Q. Now, this 4-B is yours, too, isn't it?

A. Yes, sir.

Q. Now, this 4-C?

A. That was made by our pathologist, Dr. Richman.

Q. You just told him to make one out and report to you?

A. I simply told him "take her blood and make a Wassermann," and that is the report there.

Q. And that is all you know about it?

A. Yes, sir. That is his report.

Q. Now, then, 4-D?

A. That is where I ordered an x-ray, and that is Dr. Clayton's report.

Q. But you had nothing to do with it; just took his report?

A. Just took his report, yes, sir.

[fol. 156] Q. Now, 4-C is yours?

A. That is my own memorandum.

Q. This memorandum 4-F——

A. Is made by various nurses. I don't remember which nurse.

Q. But that is just made by various nurses and that is all you know about it?

A. Yes, sir.

Q. And the same with 4-G?

A. Yes, sir.

Q. Now, this 4-H is the same thing, isn't it?

A. No, there is an exception. You see here, this is my handwriting where I made two orders, and this up here is the nurse's handwriting.

Q. Now, this—well, the rest of these, all of the rest on through, are the same thing, aren't they?

A. Yes, sir. Some of them, these were my orders, my writing, and the others by the nurses.

Mr. Marley: Now, I desire to object to the introduction in evidence of these exhibits 4-C and 4-D, and these nurses' exhibits in evidence as incompetent and hearsay. It is apparent that they were not made under his direction as con-

templated by the law. The law contemplates that he will either do it himself or make an examination himself and tell somebody to put it down for him. It doesn't mean that he can go out and have somebody make an examination and give him a written report. That is hearsay. And we object, too—we object to those as incompetent, as hearsay, and all these nurses' exhibits as incompetent and as hearsay, excepting these particular ones that show his own handwriting on them; and so far as his handwriting is concerned I believe that they would be competent. I will admit that they would be competent.

The Court: Sustained. Is that all, Mr. Wickersham?

Mr. Wickersham: No. Now, then, I offer in evidence all of the exhibits included in this packet or group except those that were made by Dr. Richman and Dr. Bahr.

Mr. Marley: And the nurses.

Mr. Wickersham: And the nurses; all that are in his handwriting.

The Court: You have already offered them, and the objection has been to the others only.

Mr. Marley: Yes. That is all right.

[fols. 157 & 158] Mr. Wickersham: Now, Doctor——

The Court: But you ought to have some way to identify them in the record, which ones are admitted.

Mr. Wickersham: All right. That will be——

Mr. Marley: Exhibit 4-A is in his handwriting, 4-B, 4-E, and his memorandum at the bottom of 4-H; and if you want this notation on 4-J in his handwriting.

Mr. Wickersham: The words "enema tonight."

Mr. Marley: Yes; and exhibit—that is 4-I, I guess, 4-J has a "liquid diet; coffee." That is on 4-J; and 4-K, potassium iodide saturate solution, drops 5 every three hours in full glass of water. G. T. T. S." That is all.

The Court: Very well.

(Which said documents, so offered, introduced and admitted in evidence as "Plaintiff's Exhibits 4-A," "4-B," "4-E," and the parts of 4-H, 4-I, 4-J and 4-K, hereinbefore described by Mr. Marley, are in words and figures as follows, to-wit:)

(Here follow Exhibits 4a, 4b, 4c, 4h, 4i, 4j, 4k, marked side folio pages 159 to 176, inc.)

PLAINTIFF'S EX. 4A 159 = 160

GRACE HOSPITAL
GENERAL HISTORY

P.G. 4 42
4/6/21 Cards
Case No. 18121

Hy. 8395

Admitted Sept. 29, 1915 7:10 A & B Room No. 412
Name Myrtle Johnson Address 402 S Harrison Age 20 Sex
Physician or Surgeon Dr. Esmond Lawler Phone
Occupation Housework Employer Address
Relative or Friend E H Johnson Address 402 S Harrison
Account guaranteed by Eli. H. Johnson Address
Chest Condition R [illegible] Apex [illegible] Base [illegible] Sputum good
Authority is hereby given to
discharge this patient Oct 9 1915 H. Elmo Lawler M.D.

THER HOSPITAL ENTRIES

Date	Case No.		
1			
2			
3			

FINAL DIAGNOSIS Oedema of Brain from Injury. Causing Partial Paralysis of R. Side.

COMPLAINT When patient came Dr. Lawler was there & sent for Dr. Stanley Jones & Dr. Chas. Hart. Dr. Jones came in the morning & when he spoke to her Paralysis of R. Side. This paralysis mostly affect R. Leg and when she tries to walk she drags the leg but can walk. Slight retentivity can be seen. X Ray does not show fracture of Temporal bone

October 9-1915

PLAINTIFF'S EX. 4A

161=162

GENERAL HEALTH Good (Poor) Poor Weight Ideal Present 150 Loss Time Yrs Mos

PAST PERSONAL HISTORY (Measles) Mumps Whooping Cough Diphtheria Scarlet Fever Chicken Pox Chorea

Pneumonia Pleurisy Typhoid Fever Malaria Influence Tuberculosis Smallpox

Remarks

E INJURIES No. Not since this one.

Remarks

A HEAD (Headache) Dizziness Epilepsy Fainting Time A M P M Seconds

Not habitually

EYES (O.D. O.S.) Remarks

EARS Hearing (O.D. O.S.) Pain Pus

NOSE Polyps Remarks

MOUTH Tonsils Teeth

THROAT

B CARDIO RESPIRATORY Chronic Cough Hemoptysis

Edema Heart Pain Past

REWARDS

C GASTRO INTESTINAL Appetite (O.D. O.S.) Digestion (O.D. O.S.) Bowels Liver (Gall Bladder)

REWARDS

D GENITO URINARY Kidneys

REWARDS

E SKIN AND NERVO MUSCULAR Paralysis

REWARDS Paralysis of left side of body

F MENSES 13 Regular Duration 4 days

REWARDS

G MARITAL Date Married 13 Children Living None (yrs) Health G P C

Died None ages Cause Month of Miss

H None Divorced Date Financial Circumstances

REWARDS

I HABITS Use of Coffee Tea Tobacco Alcohol

J FAMILY HISTORY Father Living No. 54 Months (O.D. O.S.) Died Age Cause Mother Living

age 54 Months (O.D. O.S.) Died Age Cause Brothers No. Living 2

No. Dead 1 Sisters No. Living 2 No. Dead 1 Other Near Relatives Deformity

Tuberculosis Cancer Diabetes Epilepsy Insanity

REMARKS

PLAINTIFF'S EX. 4B 163=164

GRACE HOSPITAL

PHYSICAL EXAMINATION

Mrs. Ingalls Johnson Date 9/21/37 Emer

Name Mrs. Ingalls Johnson Date Ward No.

Height ft in Weight lbs Build Nutrition Eye

Temperature Pulse Respiration Blood Pressure Date

WORKING DIAGNOSIS Pneumonia R.L. Lobe, Acute

SKIN Hot Cold Dry Moist Pale Flushed Cyanosis Pigmented Jaundiced Eruptions None

REMARKS

MUCOUS MEMBRANES Pale Flushed Cyanotic REMARKS None

ADENOPATHY General Regional None

SCALP Clean Lesions Injuries REMARKS

HAIR Color Texture Fine Quantity Abundant Moderate Scant Bald Distribution

HEAD Shape Size Normal Large Small Regular Irregular Fontanelles Open Closed Bulging Depressed

Tender Injuries Lesions Normal Painful Pulsations Abnormal Other Abnormalities Negative

REMARKS R. Ptosis droping? R. Corneal Smaller than L. and L. pupil slower than R. also drooping of R. side of face

EYES Vision Right 20/20 Left 20/20 Pupils Equal Unequal Regular Irregular Reaction (Direct Consensual Accommodation) Ophthalmoscopic Examination Negative Abnormal Optic Nerves Retinae Vessels Fundi Media Other Abnormalities

REMARKS

EARS Hearing Right Normal Left Normal Mastoid Tenderness Discharge

REMARKS

NOSE Normal Septum Turbinates Discharge

REMARKS

LIPS Normal Color Moist Dry Herpes Eruptions Other Lesions

REMARKS

BREATH Odorless Fetid Acetonic Uremic Stercoraceous

MOUTH Appearance Mucous Patches Pigmentation Ulcers

REMARKS

TONSILS Pillars Normal Red Exudate Enlarged Cryptic Buried Submerged

Size Symmetry

REMARKS

TEETH Good Poor Caries Infection Malocclusion Gums

REMARKS

THROAT Tonsils Normal Pharynx Normal Palate Normal

Mucosa Uvula Normal Smooth Hypertrophied Redness Pharynx

Tonsils Exudate Ulcers

REMARKS

VOICE Rapidly effected by pathology Normal

REMARKS

NECK (Normal)

CHEST (Normal)

BREAST (Normal)

LUNGS (Normal)

HEART (Normal)

BLOOD VESSELS (Normal)
PULSE (Normal)

ABDOMEN (Normal)

GENITALIA (Normal)

EXTREMITIES (Normal)

REFLEXES (Normal)

PLAINTIFF'S EX. 4E 167=168

PROGRESS RECORD

Mrs Myrtle Johnson 18121

Date	Time	Progress Record	Time
1962			
9 29		D.F. admitted	
9/30		for mand chang	
10/1		" " "	
10/2		" " "	
10/3		" " "	
10/4		done better	
10/5		" "	
10/8		" "	
10/9		" "	
10/10		" "	
		Still on no position on R. Hand but can walk	
		P P Cy	

PLAINTIFF'S EX. 4H 169=170

CLINICAL RECORD

Date	Temp.	Pulse	Resp.	Urine	Diet	MEDICINE	TREATMENT	NURSING
1/19								Pt admitted to bed in wheel chair left heel in Pt. ward. Pt. was unable to get urine also Pt. complained of pain in Dr. Sanders ward
1/20	9A 82 24							
						Doctor to see pt		Sleeping
						May Pt. stay in the bed during night		Restrains
								Small soft stool
								Small soft stool
	22	12	20					
						Dr. ordered urine		Dr. ordered urine

My pt. to face foreground

CLINICAL RECORD

PLAINTIFF'S EX. 4J 173=174

CLINICAL RECORD

						MEDICINE	MEDICATION	DIETARY
12								
6								
8	41	80	20				Soap	
6						Ice Capt head		
9	100	68	18				Liquid Diet	
7								
8	98	68	18			Vaccine Tetanus		
9						D.T. Emetine		
11								
12								
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								
1								
2								
3								
4								
5								
6								

Liquid diet copper

PLAINTIFF'S EX. 4K 175= 176

Ward 412 Bed 14 CLINICAL RECORD No. 18181

Date 10-2-22 Day of Disease 3rd Name Mrs Johnson & Johnson

Date	Temp.	Pulse	Resp.	Urine	Bowels	MEDICINE	NOURISHMENT	REMARKS
2nd	97	80	24					
							Liq Diet	Enjoyed
								Sponge Bath
								Chlorhex
								lines
						Ice Cap to head Cont.		Sitting up in chair Bed
9th								Im Sat. Ill in Spec at Nurse
								on case
								Olc. rub
								Given.
10th	99	100	18					Th Esmond
								No See pt.
								Mr. Sanders
2nd								to See pt.
							Soft Diet	Rel. Shed
				voided				Sile rub.
						Rt. Ved. de gitis Sal Sol		Rt. limb Sold
						U. S K-9		most of time
4th	98	100	20					Hot H2O bottle
								Applied.
5th								Olc. rub to
							Soft Diet	back and
								to limb.
								Hot Pack
								applied to
								limb
								Olc rub.
								Th. Can move
								limb some
				voided				Pt feels
								Comfortable

Rt. Ved. de gitis Sal Sol

Dig. gitis. V. to my she is feeling

Form 30—Lane Brothers Company, Kansas City, Kansas

[fol. 177] The Court: Proceed.

Mr. Wickersham: All right.

Q. Now, then, Doctor, did that paralytic condition continue during the entire time she was in your hospital?

A. It did.

Q. And what have you to say as to the progress of her case during that period of nine or ten days?

A. When she came in she couldn't walk, and when she left she was able to walk with assistance and could be understood a little bit better, and her hand moved a little bit better but not much. Her mouth, however, was not pulled around as far as it was when she first came in.

Q. Now, Doctor, what sort of diet did you prescribe for her during the time she was in your hospital?

A. I think it was principally a liquid diet.

Q. Why?

A. Because it was easier for her to handle. She couldn't handle solid food at first; couldn't swallow it.

Q. And what have you to say as to her nervous condition during that time?

A. Why, she was rather too much paralyzed to be very nervous, but her mental process, of course, was apprehensive; but she couldn't shake very well because she was too much paralyzed.

Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train in the state of New York, and between the hours of eleven and twelve at night, and was in a Pullman car, the train at the time going west, and she stood in the aisle holding onto a curtain with her right hand toward the rear portion of the berth near the partition between it and the berth just back of it, and while standing in that position in the aisle there was a sudden stopping, a lurch, a jerk of the train, and she was thrown around, to strike her head upon a portion of the upper berth, and then was caused to lose her hold upon the curtain and thrown to the floor—that was the left side of her head that was struck, and she was thrown to the floor; and in a very short space of time afterward a companion with her came to her to pick her up and she was holding her head and saying, "Oh, my head," "Oh, my head," and appeared dazed; and then they picked her up and put her on the side of the berth, and later took her to the women's dressing

room at the end of the car and bathed her face, and later undressed her and put her to bed, and that it was some diffi- [fol. 178] culty and a considerable length of time to get to sleep, perhaps more than an hour, and then the next day late in the morning toward noon that she awoke and her right side, arm and leg were cold, numb, clammy, and she hadn't full power to control the motor nerves and the muscles of the arm and leg, and she then—and her face was drawn downward to the left and that she couldn't talk normally but muttered; that with difficulty she could swallow, eat but little, and that she then arrived in Chicago that afternoon and was taken off the train, put in a wheel chair, and then from there taken to another station in Chicago and there put upon a train and brought to Kansas City, and then taken to your hospital; assuming those facts to be true, I will ask you if the conditions which you have testified to her that you found her in when you made your examination and accorded her treatment in your opinion could be caused by such a blow and violence.

Mr. Marley: Wait a minute. I object to that, your honor, as including elements that are not proper elements to be considered in a hypothetical question. As I understand, the condition to which the testimony has been given would be dependent upon her physical condition; the condition of the head. These others are not elements indicative of the cause at all; and I contend that in order to put the proper hypothetical question it would be necessary to include the condition of the woman, the blow on the head, and the effect, or the judgment as to the cause of the blow, and the effect of the blow upon the human brain; and I contend that these other elements which he has mentioned are not proper elements to include in a hypothetical question to show the cause of the injury. We object to it as incompetent.

The Court: Overruled.

Mr. Marley: I desire to save an exception, your honor.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

(To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Rail-

road Company by its counsel then and there at the time duly excepted and still excepts.)

By Mr. Wickersham:

Q. I want to add to that question these further facts: That you may assume to be true: That she was a woman [fol. 179] who weighed in the neighborhood of 150 to 160 pounds; that she was about 31 years of age; married; that for several years she had been a hair dresser in business here in Kansas City; that she had not had any ailments from the time that she was a little child, the cutting of teeth; that within the month prior to this accident and injury that I have mentioned she went on a train from Kansas City to Los Angeles, California, and from there by boat to San Francisco, attending a convention, and went to Sacramento and various side trips, and from there up to Victoria, Canada, and to Banff, and from there to St. Paul and Chicago; to New York, where she was for several days looking after hair-dressing appliances and during that time was in normal health; and went from New York the day before this happening to Nyack, New York, some 40-odd miles north of New York City, and remained there for a day and a half, and walked about and appeared normal and enjoying ordinary health.

Now, assuming all the facts which I have given in the original and supplemented question, I will ask you if in your opinion the blow and violence, such blow and violence as I have indicated in the question, could cause the results to which you have testified.

Mr. Marley: We desire to object to the question for the reasons given to the other question, and for the further reason that it is assuming facts that are not in evidence.

The Court: One of them, at least, is not in evidence; that was that she had been in good health from childhood.

Mr. Wickersham: Withdraw that portion of the question, Doctor, if there is any question about that; and if there are any other facts that counsel thinks I have not included in the question I ask him now to indicate them.

Mr. Marley: My contention is and I will indicate this: That in order to determine her condition he would have to take into consideration the nature and extent of this blow, and to further show that it could not have been caused in

any other manner; could not be reasonably apprehended to have been caused in any other manner, and that is entirely omitted in this case. In other words, to make my point clear, the evidence might indicate, by his examination and from his knowledge of it, that—and from the treatment he was giving of iodide of potassium—that there was another cause or condition in there that should be taken into consideration.

[fol. 180] The Court: Objection overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

By Mr. Wickersham:

Q. You may answer.

A. I would say the condition such as I found might have been caused by such a blow as she had on her head.

Q. Now, Doctor, did you examine her recently?

A. I did.

Q. When was it?

A. I think it was last Thursday.

Q. Will you tell what examination you made and what you found?

A. I made a complete physical examination. I put a kimono on the woman and began at the top of her head and went on down clear down to her feet, and I found that there is still some impairment of strength in the right hand; that the right leg is still impaired to an extent; that the two legs above the knee are practically the same size, but below the knee the calf of the right leg is considerably smaller, so much so it is easily discovered, than the left leg; that the foot on the right leg is much thinner than the left foot. On the face here there is still possibly a little impairment, although the impairment in the face is not as great as in the hand and in the leg; that the point of her head up over the

left side, a small point there that I found back of the coronal suture perhaps an inch and a quarter and maybe an inch and a quarter down from the sagittal suture—that is, the middle line over the left ear—there was a slight depression, and quite tender to touch.

Q. And state, Doctor, whether the examination you made this last week did or did not confirm your opinion as to the cause of these conditions.

A. It confirmed my opinion as to the cause of them.

Q. Now, Doctor, I wish you would tell the jury what hemiplegia means.

[fol. 181] A. Hemi, meaning half, a side, and plegia, half a side. That is, if you are paralyzed on one half side it is called hemiplegia.

Q. And, Doctor, tell the jury, so they will understand, how the nerves run from one side of the head to the other side of the body; so they will understand this.

A. The nerves that are in the left side of the brain come down into what is called the internal capsule. It is the mid part of the brain; and from there they cross to the other side. That is, 95 per cent of them cross to the other side.

Q. Is it a well-recognized fact in your profession that a blow upon the left side of the head may cause paralysis of the right side of the body?

A. It is.

Q. Is that the natural and normal way?

A. It is the natural and normal.

Q. And, Doctor, tell the jury what is meant by contrecoup, in the medical profession.

Mr. Marley: There is no such term in——

Mr. Wickersham: I want it in.

The Court: What is the word?

Mr. Wickersham: Contrecoup: C-o-n-t-r-e-c-o-u-p.

A. By countrecoup we mean this, for example: The best way to illustrate, we have an elastic sphere, and we make pressure on this side and as the pressure comes it is transmitted through and makes a bulging on the other side. As applied in medicine, it means sometimes, as I have seen it, a blow in the back of the head, quite a severe blow, and the head being partially elastic, at least it will make a fracture up in front from the transmission of the force through the

brain and through the elasticity in this way, that the head being a partial sphere it stands compression better than it does tension.

Mr. Marley: I submit, your honor, that is incompetent. He ought to define just what it means.

Mr. Wickersham: I think it is made very plain.

The Court: Overruled.

Mr. Marley: Exception, please.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

[fol. 182] (To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

By Mr. Wickersham:

Q. Doctor, is it a well recognized fact in the medical profession that a blow on the left side of the head may cause a lesion of the brain tissue or coverings without a fracture of the skull?

A. That is true; yes, sir.

Q. Doctor, what do I mean when I say "lesion?" What is meant by the word "lesion," so we will get that plain?

A. Injury.

Q. Doctor, what happens, ordinarily, when there is a blow sufficient to cause a lesion of the membranes covering the brain, or any of the brain cells, so far as there being any extravasation of hemorrhage is concerned?

Mr. Marley: That is objected to, your honor, as incompetent.

The Court: Well, the objection is sustained until you show that there is such a lesion in this case.

By Mr. Wickersham:

Q. Doctor, in your opinion, was there any extravasation or blood clot in this case; this woman?

Mr. Marley: Wait a minute. I object to that, your honor. It is incompetent; too broad in its scope. It should be con-

fined to the examination he made at the time that she went to the hospital.

Mr. Wickersham: All his examinations.

The Court: The objection is overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

A. At the time I examined the patient I found evidence of a lesion of the brain. At the time, of course, I couldn't absolutely determine. The brain gave evidence of pressure, [fol. 183] which means, of course, swelling of the brain; and the swelling could cover up a small hemorrhage and the hemorrhage not be manifest until after time. I don't know whether this is incompetent or not——

The Court: Go right ahead. They will object to it if it is.

The Witness: When I made my examination, I made my diagnosis "edema," or swelling of the brain. That was the diagnosis I made at the time, and since then, I believe that edema or swelling was caused by hemorrhage, because of the way the case has worked out since.

By Mr. Wickersham:

Q. Now, will you explain to this jury just the developments that have occurred to form your present opinion about the clot upon the brain and the lesion?

Mr. Marley: I object to that, your honor, as incompetent. He has explained the condition. That would be proper cross examination but not direct examination.

The Court: Objection overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

The Witness: The thing is this, that the woman came in there; the most obvious thing was the pressure, which could have been caused by the swelling of the brain, but that swelling could be caused by a tearing of the dura mater, the pia mater or the arachnoid, either one. That is the name of the several membranes covering the brain. It could be caused by a tearing down, it could be caused by the fact that they were bruised, it could be caused by the fact there was a development of a hemorrhage. Now, the woman began to clear up rather quickly. At the end of about five or six days I marked on the chart "better." For the first few days she cleared up quite a bit, then they told me this, that she—that that part of the brain that was swollen, some of the swelling seemed to have gone out, but she seemed [fol. 184] to stop. Didn't get very much better fast. It kept on, and this continued weakness, the continued evidence of the paralysis, the atrophy of the leg, or the leg and the foot, and the little impairment of the mobility in these muscles on the left side of the face told me that it was more than an edema brain; that there was some injury to the brain tissue itself. The most likely injury would be that of a clot of blood or extravasation of blood.

Q. Now, so we may understand something of the structure of the head, how many tables are there to the skull?

A. Two, the internal and external, separated by a soft tissue we call cancellous tissue.

Q. And what is the membrane that is immediately under the inner table?

A. The dura mater.

Q. And what is the membrane under that?

A. The arachnoid.

Q. And what is next to it?

A. The pia mater.

Q. Is that the covering of the brain itself?

A. That is the covering of the brain itself, and very intimately adhered to it.

Q. Now, is the portion of the brain where you find this thickness and where you find this soft depression a portion of the brain that controls the motor nerves of the body?

A. It is over the motor area; yes, sir.

Q. You spoke of some early improvement in her case the first few days, and you made a record of it; in your report of the hospital, then there was some gradual improvement. Now, then, Doctor, in your opinion has all of the improvement that is to take place taken place?

Mr. Marley: That is objected to, your honor, as incompetent, and embodies the elements to which I have objected in those previous questions. I think it is including circumstances and conditions that are too remote. I believe that his opinion should be based upon his exact examination of her, including any tests of the blood that he made, now. There is a treatment here, Iodide of potassium, and all those elements ought to be taken into consideration in giving an opinion upon this point.

The Court: Well, the doctor is asked to say whether from his examination, his several examinations of this lady, there will be or will not be further improvement in her case. I think that is a proper question. The objection is overruled.

Mr. Marley: Note an exception.

[fol. 185] (To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

A. In cases of this kind, according to the best of my knowledge, about 80 per cent of the improvement takes place within the first year to a year and a half, and after that about 5 per cent improvement is the best you can look for for the rest of the time.

By Mr. Wickersham:

Q. And is that your opinion so far as this case is concerned?

A. It would necessarily be my opinion.

Q. Now, Doctor, what do you say about this use of the right hand of hers. What use has she got of it now?

A. Oh, she has some use of it. It is impaired. But not the complete use that she should have.

Q. And about this walk—I want it in the record from a doctor, a medical man, as to what this walk is of hers.

Mr. Marley: Wait a minute. I object to that, your honor, because I don't care to have him testify as to something that is not in the record at this time.

The Court: Well, he can describe what he has observed concerning her walking and the manner of her walk.

Mr. Marley: That is assuming that he has done it for the purpose of passing judgment upon it. Now, there is in the record so far as Imogene Johnson is concerned certain things. Now, if the question that he has is based on that, I don't believe it is proper; but I don't believe *has* has a right to turn to the plaintiff himself and try to have him express an opinion by looking at her in the room.

Mr. Wickersham: I want all the knowledge that he has got from his personal examinations and treatment of her case; I want it in the record, what a doctor says as to the present condition of the leg and so forth; how she walks.

The Witness: The right leg from the knee down is smaller than the left leg from the knee down, and there is atrophy of the foot; and in her walking she handles it in a certain way, throws it in a certain way, showing there is impairment of the nerve function of the muscles of that leg.

(fol. 186) Q. And in what way, now, so we will get it, does the toe turn when she tries to walk?

A. I didn't notice.

Q. Doctor, what is the reasonable value of the services which you have rendered for her as her physician?

Mr. Marley: Now, that is objected to, your honor, as incompetent, because it doesn't indicate in which case.

The Court: Yes. Differentiate.

Mr. Wickersham: I will ask that for the husband's case.

The Witness: For the husband's case? I don't understand what you mean.

Mr. Wickersham: That don't involve you at all.

The Court: That is — assuming that the husband has to pay the bill, that is all; the value of your services rendered to this woman.

A. A hundred dollars.

Mr Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Now, Doctor, you discharged her from the hospital, you say, October 9?

A. I think that is the date.

Q. Yes, that is my recollection. Now, from October 9 down to the present time how many times have you seen her to examine her professionally?

A. Two or three times.

Q. When was the second time?

A. I think the second time was about February 1.

Q. This year?

A. Yes, sir.

Q. So that from October, 1925, to February 1, 1927, you didn't see her at all, did you?

A. I saw her, but not professionally.

Q. That is what I mean. I am limiting it now to a doctor.

A. Yes, sir.

Q. Now, during that time you didn't keep run of her in any way, did you?

A. No, sir.

Q. You don't know how many doctors she had at all, do you?

A. No, sir.

Q. You don't know how many different kinds of treatment she had been given in the meantime, did you?

A. No, sir.

Q. You don't know how many different kinds of medicine had been given her, do you?

A. No, sir.

[fol. 187] Q. So that in expressing your opinion here just now as to the cause of her present condition and as to the permanency of her injuries, you excluded from your consideration, or, at least, didn't have into your consideration any effect these other medical treatments might have had

upon her, if there had been any mistakes made by the doctors prescribing, did you?

A. No, sir.

Q. So that that is out of your mind entirely.

A. Entirely.

Q. Now, then, Doctor, this woman, it seems, weighed about 160 pounds. The pictures indicate that she was—I will show you plaintiff's exhibit 1. That indicates that she was a fleshy woman. Now, in the first place, on the head—when the head strikes, there is the hair of the woman, isn't there?

A. Yes, sir.

Q. And you found on her head a reasonably thick head of hair, didn't you?

A. She had hair on her head; yes, sir.

Q. A reasonably thick head of hair?

A. I presume there was, yes. I don't know.

Q. All right. Now, next to that comes the skin; isn't that right?

A. Yes, sir.

Q. Now, between the skin and the outer bone—I forget what you call it—is the fat of the body, isn't it? There is a layer of fat in there, isn't there?

A. Well, yes, there is some fat in there.

Q. There is a layer of fat in there?

A. Yes, sir.

Q. Then comes the outer bone. What do you call it?

A. Oh, no, there is other things in there yet.

Q. What is next?

A. The aponeurosis; what you generally call the striffin, and then the outer table of the skull.

Q. Then the outer table of the skull.

A. Yes, sir.

Q. Now, then, taking the hair and the skin and the fat, that forms a kind of a cushion?

A. It does to a certain extent.

Q. To protect the brain from a blow doesn't it?

A. It forms a kind of a cushion to protect the tissues; yes.

Q. Then after that comes this membrane you spoke about, then comes the outer bone. What do you call it?

A. Outer table.

Q. Outer table. Then there is a space in between, is there?

A. Yes, of kind of a spongy-like bone called the diploe.

Q. The diploe. Now, that in itself will absorb the shock, won't it?

A. That is the purpose.

[fol. 188] Q. God can't beat in his plan, can He?

A. I have never found Him beaten.

Q. Now, then comes the inner table?

A. Yes, sir.

Q. All of those are really shock absorbers, aren't they?

A. Yes, in a way.

Q. Now, next comes the dura mater, you say?

A. Yes, sir.

Q. How thick is that?

A. Well, it is possibly a sixty-fourth of an inch thick.

Q. That is also intended as a kind of cushion, isn't it?

A. It is the very top membrane; yes, sir.

Q. Then comes the arachnoid?

A. Yes, sir.

Q. How thick is that?

A. The arachnoid is more like a net-work. It is very thin and very silky, like.

Q. But it still has a tendency to absorb the shock, doesn't it?

A. No, sir, not that.

Q. It doesn't?

A. No.

Q. Now, then, take the pia mater.

A. The pia mater is a very thin, perhaps one-third as thick as the dura mater, and is intimately applied over the brain to hold the sulci of the brain in shape.

Q. Yes. So that whenever there would be a blow, that blow would have to go through the hair, the force of the blow, through the hair and the skin and the fat and the various membranes, wouldn't it?

A. It would; yes, sir.

Q. Yes. Now, in order to make an indentation, Doctor, wouldn't it require a sharp instrument to do that?

A. Not necessarily; no, sir.

Q. Do you contend or would you say that if a woman is standing up and falls back and falls forward and hits the side of an upper berth that that would be a blow sufficient to do it?

A. I have seen many a skull fracture without hardly any mark on the skin at all.

Q. I know, but I am asking you if you think that could do it.

A. Yes, sir, it could do it.

Q. Now, I notice here you gave her iodide of potassium.

A. I did; yes, sir.

Q. What is that for?

A. That is for the absorption of any brain edema or any possible clot or exudate that may be there.

Q. Well, would those all come from this blow, you think?

A. It could.

Q. But did it?

A. I think it did; yes, sir.

[fol. 189] That is your judgment?

A. That is the theory upon which I treated the case; yes sir.

Q. I know, but couldn't there be another theory in that case?

A. Yes, sir. I suppose there could be hundreds of theories; yes, sir.

Q. That is just your opinion?

A. That is just my opinion; yes, sir.

Q. Now, you know the Pullman company has a heavy carpet on the floor don't you?

A. All the Pullman cars I have seen had carpet on the floors.

Q. You don't think a blow like that, hitting that way, glancing, hitting the carpet, could produce the condition you have testified to?

Mr. Chilcott: Just a minute. Your honor, that is objected to on the ground that — is entirely outside the evidence. There is no claim that she hit her head on the floor whatever.

The Court: So far there has been no showing as to what she did hit her head on. Mrs. Johnson, who testified, said she didn't know.

Mr. Chilcott: Yes; I will supply that proof.

By Mr. Marley:

Q. Now, then, Doctor, I believe you saw an x-ray taken, didn't you, at the time she was admitted into the hospital?

A. I don't remember whether I saw it or not. I was just simply a matter of routine for the x-ray.

Q. I know, but don't you recall examining that x-ray at that time?

A. Oh, I examined the x-ray as soon as it was taken; yes.

Q. Don't you recall the fact that x-ray showed no fracture at all?

A. I recall that is true; yes, sir.

Q. Have you still that x-ray?

A. It is at the hospital.

Mr. Marley: That is all, Doctor.

Redirect examination.

By Mr. Wickersham:

Q. Just one question, Doctor. Among the records you brought here was a record with reference to blood test. I will ask you if in the ordinary routine of your hospital in [fol. 190] cases anywhere similar to this you cause blood tests to be made?

A. We do.

Q. Was Dr. Richman in your hospital at that time?

A. Dr. Richman was our pathologist at that time; yes, sir.

Q. And is this record as contained in your files that is signed "Dr. Richman" the record that he made for this blood test?

A. It is.

Mr. Wickersham: That is all I want to ask you now. Please don't leave, because I want to put Dr. Richman on the stand.

Mr. Marley: Wait just a minute.

Recross examination.

By Mr. Marley:

Q. Doctor, do you remember—do you make blood tests there at the hospital?

A. We do.

Q. What are those tests?

A. Oh, we make a number of blood tests.

Q. I know——

A. For example, we make a Wassermann test, we make a test for coagulation, we make a test for the presence of bacteria in the blood; we make tests of the blood to see how much urea; we make tests to see how much sugar there is in the blood, and all those things.

Q. I understand, Doctor, but you are speaking here about a Wassermann test, I believe.

A. That is a Wassermann test; yes, sir.

Q. In a Wassermann test, what test do you make? Where do you get your fluids?

A. The blood. Generally take it from the arm.

Q. Do you ever take it from the spinal cord in the lumbar region?

A. It is sometimes done; yes, sir.

Q. Isn't that regarded as the most accurate test?

A. Not necessarily, no.

Q. Also don't they take a fluid from the liver?

A. I never have known it. Whether they do it I don't know.

Q. Isn't it very frequently the case that when you take a blood test from the arm that it might show negative when if you took it from the lumbar region of the spinal cord it would show positive?

A. Oh, there are such conditions, but not frequently.

Q. It does happen, doesn't it?

A. It does happen; yes, sir.

Q. As a matter of fact, the infallible test is the test that is taken in the lumbar region of the spinal cord, isn't it?

A. I know of no infallible test in the history of medicine. [fol. 191] Q. Well, that is regarded as the nearest infallible? I will admit there is no infallible test.

A. No, it is no more infallible than the blood test. It is just one form of laboratory analysis that helps us arrive at a conclusion in the case.

Q. As a matter of fact, Doctor, don't they sometimes take blood tests that show negative when as a matter of fact it develops there is a positive condition there?

A. It does; yes, sir.

Mr. Marley: That is all.

Mr. Wickersham: I just want to ask you one question on that.

Q. You take the blood tests, the Wassermann tests, such as you have described, in all cases where you take them at all, from the arm?

A. As far as I am personally concerned, yes.

Q. You are perfectly satisfied that that is a reliable test?

A. For certain things; yes, sir.

Mr. Wickersham: Yes. That is all.

Mr. Marley: Wait a minute.

Q. What are those certain things, Doctor?

A. The test whether there is syphilis or not in an active form.

Q. Whether or not there is syphilis in an active form; but supposing there is not in an active form, a luetic condition that is not active, then what?

A. Well, when you have a luetic condition and there is still symptoms that are not accounted for by other things you go further; you go into the spinal column.

Q. That is it exactly, and that is the one that goes in and finds out whether it is in the system or not, doesn't it?

A. Not necessarily; no more than the blood test.

Q. But you say the blood test is in the active form.

A. Sometimes not even in the active form. I have taken blood tests that were positive and the spinal column tests that are negative.

Mr. Marley: That is all.

(Witness excused.)

Dr. Samuel H. Richman was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

[fol. 192] Direct examination.

By Mr. Wickersham:

Q. State your name, please.

A. Samuel H. Richman.

Q. Are you a physician?

A. Yes, sir.

Q. Regularly licensed and practicing in the state of Missouri?

A. Yes, sir.

Q. And for how long?

A. I have been licensed in Missouri for eight years. I have been licensed to practice in Illinois since 1909.

Q. Doctor, did you have any connection with Grace hospital in the months of September and October, 1925?

A. Yes.

Q. What was it?

A. I was pathologist there.

Q. And was it a part of your business to make certain blood tests that were directed by Dr. Sanders?

A. Yes.

Q. I show you plaintiff's exhibit 4 C, and ask you if that is one of the original records of Grace hospital containing a report of a blood test made by you of Mrs. Myrtle Johnson.

A. It is.

Q. Is that your handwriting at the bottom?

A. That is my handwriting.

Q. Did you make that blood test indicated there?

A. Yes, I made it.

Q. What was the result of your test?

Mr. Marley: Wait a minute. It speaks for itself.

Mr. Wickersham: No, I will have him testify.

A. Well, it is negative. Marked here negative.

Q. Now, what does that mean, Doctor?

A. It means that as far as the Wassermann test for syphilis that it showed negative. It showed that there was —well, what we call as a positive indicates syphilis and as a negative is not indicating syphilis.

Q. Does that mean she didn't have it, according to your opinion, or not?

A. No——

Mr. Marley: Wait a minute. I object to that, your honor. He can offer this testimony in evidence; this report.

Mr. Wickersham: I offer this report in evidence.

No. 3628

PATHOLOGICAL LABORATORY

GRACE HOSPITAL

Register No.

Name Mrs Ruth E Johnson Room No. 412 Date 4-30-24

Age Sex Dr

URINE: Sp. Gr. Alb. Casts.
Color Sugar Red Blood Cells
Reac. Indol White Blood Cells
24 hr. Quantity cc. Urea Crystals
Catheterized Diazo Epithelial Cells
Amt. Submitted Bile Worm
Hemoglobin Bacteria

BLOOD: Red Cells Widal
White Cells Blood Culture Negative
Hemoglobin per ct. Method Wassermann
Pressure m.m. Hg. Method Abderhalden

Differential Normal Tuberculin reaction Method

Polys	per ct.	60-75 per ct.	Neutrophiles		Pechkelocytes
Small Lymphos	per ct.	15-30 per ct.	Eosinophiles		Polychroms
Large Lymphos	per ct.	3-10 per ct.	Basophiles		Stippled
Trans	per ct.	4-6 per ct.	Normoblasts		Plates
Eosins	per ct.	2-4 per ct.	Parasites		
Masts	per ct.	0.5-1 per ct.	Coagulation Time		
Unspec	per ct.	0 per ct.			

C.S.F.: RBC FLUID Bacteria Alcohol Blood
Mucin Red Blood Cells Lactic Acid
Time White Blood Cells Iron Rx
Quantity Bile L. Combined HCl
Character Worm Organic Ac. & N.
Other Retained Food Total Acidity

STOOL: Amount Other Worm
Color Blood Food Remains
Consistency Parasites and Bacteria

SPUTUM: Quantity Other Blood
Character Tubercle Bacilli
Consistency Other Bacteria

EKG: TB From Above

URINE: From Above
CULTURE From Above

Remarks

H B Durham M.D.

Mr. Marley: No objection.

[fols. 193 & 194] The Court: Very well.

(Which said document, so offered and introduced in evidence as "Plaintiff's Exhibit 4-C," is in words and figures as follows, to-wit:)

(Here follows Exhibit 4-C, marked side folio pages 195 and 196)

[fol. 197] Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Now, Doctor——

A. Yes, sir.

Q. Is this the one you had, exhibit 4-C?

Mr. Wickersham: That is the one I had.

By Mr. Marley:

Q. That you made on the 30th day of September, 1915? I believe you testified that it was made at the request of Dr. Sanders.

A. It evidently was. I never made them of my own accord. They were submitted to me.

Q. And I believe it appears that this party was admitted to the hospital September 29, 1925.

A. Yes, sir.

Q. So that this test was made the day after she got there.

A. The day after she got there.

Q. Now, what test did you make?

A. I used the standard Wassermann test.

Q. What is the standard Wassermann test?

A. Well, it is quite a complicated affair.

Q. Where did you get your blood from?

A. You get the blood from the patient.

Q. I know, but from what part of the body of the patient?

A. From the arm.

Q. I didn't think you got it from a horse or a mule, but I wanted to know where you got it from the patient.

A. From the arm, usually.

Q. Now, then, is that the only place you get it from?

A. I don't recall in recent years that I have had to get it from any other place, so that it probably was.

Q. Now, when it is taken from the arm there, is that taken to show the active condition of syphilis, or is it to show any condition of syphilis?

A. Well, the Wassermann test, you know, doesn't exclude the person having syphilis absolutely.

Q. I understand that.

A. Is that what you want me to say?

Q. Go ahead, now.

A. It merely means we cannot—the Wassermann test is fairly reliable, that is, as a test of syphilis, but is doesn't rule out syphilis entirely; not always.

Q. In other words, it could show negatively when as a matter of fact there was a luetic condition?

A. It could be negative with a luetic condition, yes.

Q. Yes, that is it exactly. Now, then, after it leaves the active stage and goes into—I won't say the secondary [fol. 198] stage, but when it gets in, gets down into the nerves and the tissues, have you any other tests by which to locate it if the blood test doesn't indicate it?

A. Well, if—we often resort to a spinal fluid test.

Q. Yes, taken from the spinal column, in the lumbar region?

A. Right.

Q. Now, then, that is resorted to after the other test has failed, isn't it?

A. That is, it depends entirely on the physician.

Q. Upon the physician; each man has his own ideas?

A. His own ideas; exactly.

Q. Now, isn't there another test, a fluid test that is used of the Wassermann character by taking the fluid from the liver?

A. No, it isn't practical. It is hardly ever done.

Q. Hardly ever done?

A. No.

Q. Then wouldn't it be this way, that you first would take a blood test and if it didn't reveal and you wanted to

make sure then you take the second test from the spinal column fluid in the lumbar region, don't you?

A. One would only do that in a certain class of cases. You would do that, for instance, in cases that showed nervous symptoms, and then even in the discretion of the doctor.

Q. I know. Now, then, where you have a case that shows nervous symptoms you would take the test of the fluid in the spinal column, wouldn't you?

A. The doctor, to be thorough, I believe should do that.

Q. Yes. In other words, if he had a suspicion in his mind that the plaintiff was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?

A. That is assuming that the patient is in a condition to——

Q. That is what I say; in order to confirm his suspicion that there was a condition of that kind.

A. I will modify that by saying that assuming that the case and the patient's condition warrant it, because it is quite an ordeal.

Q. I know, but then, what I am getting at is we started out by saying that the patient was nervous——

A. To make a thorough test as to neurosyphilis one ought to have shown——

Q. Yes, to make a thorough test as to neurosyphilis there should be a test taken of the spinal column, shouldn't there?

A. Assuming the blood is negative.

Q. Yes, assuming the blood is negative.

[fol. 199] A. Of course, if the blood was positive you wouldn't need that.

Q. Yes. Now, then, they determine that from the nervous condition of the patient, don't they?

A. Nervous symptoms, yes.

Q. Yes; in other words from the nervous symptoms of the patient you are induced then to make this test about which you have just testified?

A. Yes.

Mr. Marley: That is all.

Mr. Wickersham: That is all.

(Witness excused.)

Q. I didn't think you got it from a horse or a mule, but I wanted to know where you got it from the patient.

A. From the arm, usually.

Q. Now, then, is that the only place you get it from?

A. I don't recall in recent years that I have had to get it from any other place, so that it probably was.

Q. Now, when it is taken from the arm there, is that taken to show the active condition of syphilis, or is it to show any condition of syphilis?

A. Well, the Wassermann test, you know, doesn't exclude the person having syphilis absolutely.

Q. I understand that.

A. Is that what you want me to say?

Q. Go ahead, now.

A. It merely means we cannot—the Wassermann test is fairly reliable, that is, as a test of syphilis, but is doesn't rule out syphilis entirely; not always.

Q. In other words, it could show negatively when as a matter of fact there was a luetic condition?

A. It could be negative with a luetic condition, yes.

Q. Yes, that is it exactly. Now, then, after it leaves the active stage and goes into—I won't say the secondary [fol. 198] stage, but when it gets in, gets down into the nerves and the tissues, have you any other tests by which to locate it if the blood test doesn't indicate it?

A. Well, if—we often resort to a spinal fluid test.

Q. Yes, taken from the spinal column, in the lumbar region?

A. Right.

Q. Now, then, that is resorted to after the other test has failed, isn't it?

A. That is, it depends entirely on the physician.

Q. Upon the physician; each man has his own ideas?

A. His own ideas; exactly.

Q. Now, isn't there another test, a fluid test that is used of the Wassermann character by taking the fluid from the liver?

A. No, it isn't practical. It is hardly ever done.

Q. Hardly ever done?

A. No.

Q. Then wouldn't it be this way, that you first would take a blood test and if it didn't reveal and you wanted to

make sure then you take the second test from the spinal column fluid in the lumbar region, don't you?

A. One would only do that in a certain class of cases. You would do that, for instance, in cases that showed nervous symptoms, and then even in the discretion of the doctor.

Q. I know. Now, then, where you have a case that shows nervous symptoms you would take the test of the fluid in the spinal column, wouldn't you?

A. The doctor, to be thorough, I believe should do that.

Q. Yes. In other words, if he had a suspicion in his mind that the plaintiff was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?

A. That is assuming that the patient is in a condition to——

Q. That is what I say; in order to confirm his suspicion that there was a condition of that kind.

A. I will modify that by saying that assuming that the case and the patient's condition warrant it, because it is quite an ordeal.

Q. I know, but then, what I am getting at is we started out by saying that the patient was nervous——

A. To make a thorough test as to neurosyphilis one ought to have shown——

Q. Yes, to make a thorough test as to neurosyphilis there should be a test taken of the spinal column, shouldn't there?

A. Assuming the blood is negative.

Q. Yes, assuming the blood is negative.

[fol. 129] A. Of course, if the blood was positive you wouldn't need that.

Q. Yes. Now, then, they determine that from the nervous condition of the patient, don't they?

A. Nervous symptoms, yes.

Q. Yes; in other words from the nervous symptoms of the patient you are induced then to make this test about which you have just testified?

A. Yes.

Mr. Marley: That is all.

Mr. Wickersham: That is all.

(Witness excused.)

Dr. B. C. Bahr was thereupon called as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. What is your full name, Doctor?

A. B. C. Bahr.

Q. You are a regularly licensed and practicing physician in the state of Missouri?

A. No, sir, I am a Ph. D.

Q. A Ph. D.?

A. Yes, sir.

Q. Is that name "Bahr" on the foot of that report in your handwriting?

A. Yes, sir.

Q. Did you make that report?

A. Yes, sir.

Mr. Marley: What do you mean by Ph. D., Doctor?

A. Doctor of Philosophy.

Mr. Marley: Wait a minute.

By Mr. Wickersham:

Q. Doctor, are you connected with Grace hospital?

A. Yes, sir.

Q. And have been how long?

A. For the last eight months.

Q. What work are you doing there?

A. Pathological, bacteriological and seriological work.

Q. How long have you been engaged in that work?

A. Ten years.

Q. For what institutions?

A. I was with the United States army during the war army medical school; from there United States general hospital 26. After the cessure of the war I went to St. [fol. 200] Francis Hospital at Grand Island, Nebraska, for four years; then I was in practice of my work at Arkansas City, Kansas, and since the 1st of July at Grace hospital.

Q. You are a graduate of what school?

A. Gradute of Sorbonne, Paris, and Breslau, Germany.

Q. The Sorbonne, Paris.

A. Yes, sir.

Q. Now, Doctor, during all this time have you taken many blood tests known as the Wassermann test?

A. I have taken such. I have specialized in that During the war I was sent to the chief of laboratory, U. S. general hospital 26, from the army medical school especially for doing seriological work.

Q. All right. Doctor, those are your qualifications. Now I want you to tell the jury if on the first day of February, 1927, you made a Wassermann test of Mrs. Johnson.

A. So this report shows.

Q. Well, did you? That is the lady sitting back there. Is that the lady?

A. I didn't see the patient, sir.

Q. Oh, you didn't see the patient. Well, how did you do it?

A. Dr. Sanders took the blood and brought it over to me and I examined it.

Q. I see. All right. Now, then, you tell us; what did you find?

Mr. Marley: I object to that, your honor. There is no evidence here that that is her blood.

Mr. Wickersham: Oh, Well, I will supply it in just a minute by Dr. Sanders.

The Court: Dr. Sanders testified he furnished a specimen to this gentleman, as I recall it.

A. I found a negative—a negative finding is such where a certain condition do not exist. The specific examination is made of the blood for—the request was for syphilis. We call it a Wassermann test through the fact that the first man who modified——

Mr. Marley: I object to that, your honor, as immaterial.

Mr. Wickersham: All right.

Q. You found it negative?

A. Yes, sir.

Mr. Wickersham: I will offer that in evidence.

[fol 201] Mr. Marley: Let me see it. (Examining document.)

Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Now, of course, all you know is the blood was brought to you; that is all you know?

A. Yes, sir.

Q. Now, then, you don't know where the blood was taken from, do you?

A. I have no idea; no, sir.

Q. What test did you make?

A. I made the Kolmar, the Wassermann-Noguchi modification, and Hecht-Weinberg; three different tests.

Q. But there was no fluid brought to you at all; just the blood?

A. The fluid is in the blood.

Q. The blood and the fluid——

A. The blood is the fluid.

Q. I understand, but do they bring you any fluid from the spinal column, taken from the lumbar region?

A. No, sir.

Q. Now, then, you are not a doctor, are you?

A. No, sir, I am not a physician, no, sir. I take the course similar to a physician, but not a physician.

Q. It is more of a chemical laboratory——

A. It is tissue work.

Q. Have you ever taken tests of the fluid taken from the spinal column in the lumbar region?

A. Yes, sir.

Q. Doesn't that—Haven't you found that that would sometimes report positive when the blood test would report negative?

A. That condition exists sometimes, but I don't—this has to be more specified as other tests, and under certain conditions it will be present.

Q. Well, now, the conditions that they use a fluid of the spinal column is more in the nature of the secondary condition, isn't it, when it has ceased to be an active poison?

A. Well——

Q. The germ is what is called——

Mr. Wickersham: Wait a minute. Let him answer.

Mr. Marley: Go ahead.

A. I have to go into the tests specifically, and as to the differentiation between the lumbar puncture, the spinal fluid test, and the test from the blood, it is the same test that is used, with sometimes different findings; yes.

[fol. 202] Q. In fact, you don't know anything about it from a physician's standpoint, do you?

A. No, sir.

The Court: Is that all?

Mr. Marley: That is all, your honor.

(Witness excused.)

Dr. St. Elmo Sanders was thereupon recalled as a witness on behalf of the plaintiff and, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Wickersham:

Q. Now, Dr. Sanders, counsel for the defendant has interrogated you with reference to these blood tests, and I want you to tell this jury why you had them made.

A. When we have a patient it is our endeavor to do the best for the patient we can, and we want to know what is wrong with them and as a result we have certain specific things that we do, in a way as a practice. It is kind of a routine with us. A person comes up; they have an injury. Well, now, here we consider the injury. Why would we examine a patient? If they have syphilis they won't heal so well; we will know what to do to help in healing it, and we do it in that review. It is a matter of routine and not on account of circumstances, although sometimes we find there are symptoms that resemble syphilis that *that* are negatived by other things. In other words, all these examinations are made with the purpose of helping the patient, that is all.

Q. Now, then, doctor, I want you to tell the jury if you found any evidence of any kind or character from your examinations and treatment and care of this woman that she had any syphilis.

Mr. Marley: Wait a minute. I object to that, your honor, because it has developed here the examinations, the tests, were made by somebody besides himself, and if he testified to it it would be hearsay.

The Court: The question is as to what he found. Objection overruled.

Mr. Wickersham: I don't mean as to these two tests.

Mr. Marley: All right, if you are limiting it to that.

[fol. 203] By Mr. Wickersham:

Q. Now, Doctor——

A. All sorts of other things a physician determines those conditions by.

Q. Are there, Doctor, other things you can determine them by?

A. There are.

Q. Tell us about it.

A. For example, if you take a patient and you feel in the groin here and you find a number of enlarged glands here——

Q. Did you find any on this woman?

A. I did not. Up here, in syphilis, we find them in the neck.

Q. Did you find those on this woman?

A. We did not. Then we find certain scars. If a person has had syphilis they have scars, marks on their body, and those scars are rather distinct, indicating at least the suspicion.

Q. Was there any such things on this woman?

A. No.

Q. What was the condition of her skin when you examined her the 1st of this month?

A. It was good, excepting for a few little acne pimples on it anybody is liable to have.

Q. What have you to say now about the patellar reflexes in that connection?

A. That is the kick that we get by striking here. They are exaggerated in her case.

Q. Do you ever have an exaggerated knee reflex where there are syphilitic conditions?

A. In one condition only, and that is where it is a paraplegia and not a hemiplegia we may have it in the earlier

stages. Such a condition may occur in the earlier stage of the secondary, within a few weeks after the infection, but not an infection that has occurred some time before. In an infection that has occurred some time before the reflexes are always diminished in syphilis.

Q. As I understand you, syphilis diminishes the amount of the reflex; and this woman has an exaggerated reflex?

A. She has an exaggerated reflex. That is correct; yes, sir.

Q. Now, what do you say—there is another test, isn't there, another way that physicians know about the shin?

A. Well, in the shin bone the line here on the shin bone, if the person has had syphilis any length of time at all there will be lumps and knots on that shin bone.

Q. Any on this woman?

A. No.

[fol. 204] Q. Did you find anything to indicate that she had any syphilis?

A. I did not. I looked at her eyes. Now, in the pupils of the eyes is another thing we always have in syphilis. The pupils of the eyes in later stages of syphilis are partially dilated, and they are immovable as regarding light. Now, if you bring a light up to your eye you will find the pupil gets smaller; take it away, it will get larger. Now, in syphilis in the later stages the pupils do not respond to that like that. They do respond to accommodation but not to light. So this woman had no—she had a complete response to light in her eyes.

Q. Now Doctor, did some doctor representing himself as an agent of this railroad company come to you some weeks ago and talk to you about any syphilis trouble of this woman?

Mr. Marley: I object — that, your honor.

The Court: Sustained.

By Mr. Wickersham:

Q. What was the occasion of your making this test——

Mr. Marley: We object to that, your honor——

Q. —the first of this month?

Mr. Marley: —as incompetent and immaterial. He made the test and the result is shown.

Mr. Wickersham: I don't want, your honor, the inference drawn that it was made because there was any thought it was there. I want to show the facts.

The Court: He said he had no such thought.

Mr. Wickersham: Yes. All right. You may examine. Wait a minute.

Q. Oh, by the way, Mr. Chilcott reminds me I didn't ask you about this last blood test. Tell the jury, did you take the blood from Mrs. Johnson and put it upon a plate and give it to Dr. Bahr for his test?

A. I did.

Q. That is all—oh, by the way, he refreshes my recollection as to another thing. I want to ask you if it differentiates this woman's case from anything like locomotor ataxia, this movement of the leg as she walks. Tell us about that, please.

A. Locomotor ataxia is a disease caused as one of the late manifestations of syphilis, and is an entirely different walk from what this woman has.

Q. In what way, so we understand it?

A. Well, in this way: In locomotor ataxia the nerve endings in the palm of the hand and in the sole of the foot die. [fol. 205] The result of it is they haven't the sense of touch that they have otherwise, and when they walk the locomotor ataxia swings his leg like that.

Mr Marley: If the court please, I don't believe there is a question of locomotor ataxia in this case at all, so far as the evidence is concerned so far, and I object to going into it.

Mr. Wickersham: If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question.

Mr. Marley: I am saying now there was nothing said about locomotor ataxia, and he is going into something that isn't within the range of the testimony as developed at this time; and we object to it as incompetent; too remote.

The Court: Objection sustained.

Mr. Wickersham: The idea was, your honor, that this evidence about the blood test—I wanted to go into it if there is any question about it. That is all. You may examine.

Cross-examination.

By Mr. Marley:

Q. Now, what you call paraplegia is paralysis from the hips down, isn't it?

A. Yes; transverse.

Mr. Marley: That is all.

Mr. Wickersham: That is all.

(Witness excused.)

The Court: Take a recess for five or six minutes.

(Which was accordingly done.)

Mrs. Helen Ellsberry was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please.

A. Mrs. Helen Ellsberry.

Q. And where do you live, Mrs. Ellsberry?

A. 717 West Thirty-ninth.

Q. And what is your profession?

A. I am an R. N.; registered nurse.

Q. And were you in September, 1925?

A. When?

[fol. 206] Q. September, 1925.

A. Why, I guess it was in September. I don't know just the month.

Q. Were you in attendance upon Mrs. Myrtle Johnson when she was injured, in Grace hospital?

A. Yes.

Q. And did you make out the records—I hand you plaintiff's exhibit 4 E and ask you if you made that out?

A. This?

Q. Yes.

A. No.

Q. I hand you plaintiff's exhibit 4-F and ask you if that is in your handwriting.

A. Well, this up here? No, that isn't in my handwriting.

Q. Did you make out this chart?

A. That is in my handwriting.

Q. Well, I hand you plaintiff's exhibit 4-G and ask you if you made the chart?

A. Yes, I made that out.

Q. I hand you plaintiff's exhibit 4-H and ask you.

A. That is Miss Witisky (?).

Q. That is not your handwriting?

A. No. Mine has the name at the top.

Q. Well, I hand you plaintiff's exhibit 4-I, and ask you if that is made out in your handwriting.

A. That is in my handwriting.

Q. I hand you plaintiff's exhibit 4-M and ask you if it is in your handwriting?

A. Yes.

Q. I hand you plaintiff's exhibit 4-N and ask you if it is in your handwriting?

A. Yes.

Q. I hand you plaintiff's exhibit 4-O and ask you if it is in your handwriting.

A. Yes.

Q. Plaintiff's exhibit 4-P, and ask you if it is in your handwriting.

A. Yes.

Q. Plaintiff's exhibit 4-Q and ask you if it is in your handwriting.

A. Yes.

Q. And what was that the last one that you took—no, I hand you plaintiff's exhibit 4-R and ask you if it is in your handwriting?

A. Yes.

Mr. Chilcott: We now offer in evidence—you have already looked at these, Mr. Marley.

Mr. Marley: Yes, I want to look at them. I submit your honor, that——

Q. These are made out by you, are they not?

A. Yes, some of them are made out by me. There is a few pages that are not.

[fol. 207] Mr. Marley: I submit those that were made out by her could be used by her for the purpose of refreshing her memory.

The Court: I think that is right. I think that is true of all the exhibits, but then, you waived the objection to the others.

Mr. Marley: If she has no independent recollection of it.

Mr. Chilcott: Well, I offer in evidence plaintiff's exhibits 4-L to 4-R, inclusive, as part of the record of Grace hospital of this case.

Mr. Marley: I object to them as incompetent and as hearsay, and transactions of third parties. I admit that she can use them for the purpose of refreshing her memory and testifying from her memory as refreshed as to what was done.

The Court: I don't know of any theory that would admit such a record in evidence.

Mr. Chilcott: Well, all right.

Q. I hand you plaintiff's exhibit 4-L and ask you to refresh your recollection by looking at it and state the date upon which it was made and the condition of the patient and what you did as you observed on that date.

Mr. Marley: Now, in order to make it clear, I don't object to her reading from it. She can read it, then rely on her memory as refreshed to tell what she did.

The Court: Yes. You can only refresh your memory from memoranda which you made.

Mr. Chilcott: Read that exhibit over, Mrs. Ellsberry.

The Court: Don't read it audibly. You can read it to yourself to refresh your memory.

Mr. Chilcott: Read it to yourself.

The Court: It would save a lot of time, Mr. Manley, however, if that is not a matter of importance——

Mr. Marley: Well, if you will let me glance at them and see what they are maybe we will let her read from it. I don't want to obstruct anything, but if I can look it over a minute I will see. I notice that there is some of it, your honor, abbreviated. I would have no objections to her reading it if she will explain the abbreviations; give it in full, your honor.

[fol. 208] The Court: Now, I suggest if you have no objection to her reading it, then why not—this is merely a suggestion—why not withdraw your objection to it and let it be introduced in evidence, so it may be used whenever you, either of you, desires to use it?

Mr. Marley: That will be true, but there are some abbreviations there.

The Court: Yes. I should say let her explain the abbreviations then they can go in evidence, if the abbreviations are given.

The Court: Very well.

Mr. Marley: Now, in order to make it clear, your honor, I will call attention to what I have in mind. Let's see. They start with 4 L, isn't it, Chilcott?

Mr. Chilcott: Yes, 4 L to 4 R, inclusive.

Mr. Marley: I notice here——

The Witness: Potassium iodide, drops five, saturated solution.

Mr. Marley: What is the "11, 3, 6, 9?"

The Witness: That is the time I gave it; 11 o'clock, 3, 6 and 9.

Mr. Marley: That is what I am getting at.

The Witness: Those that are marked out.

Mr. Marley: Now, exhibit 4 L. Of course, these that are in full speak for themselves, but I notice here these potassium iodide—

The Witness: Saturated solution, one glass of water. H.O, that means water.

Mr. Marley: Now, there is "8, 2, 4, 5, 8."

The Witness: "8, 11."

Mr. Marley: "8, 11, 2, 5 and 8." What are those, the hours of the day or night?

The Witness: Yes.

Mr. Marley: And those that are stricken with a line through indicate that you gave those?

The Witness: That is when I gave those.

[fols. 209 & 210] Mr. Marley: But you didn't give—where it isn't stricken out it wasn't given. Now, then, this same abbreviation appears there in 4 M, potassium iodide.

The Witness: Drops five.

Mr. Marley: "9, 12, 3, 6 and 9," all given at those hours. Now, this "KI"

PLAINTIFF'S EX. 4L

211=212

18121

CLINICAL RECORD

Myrtle Johnson — Kalkberg

				MEDICINE	EQUIPMENT	REMARKS
Oct	9th	22				Hot Pack applied to Lt. Lumb. Dis. Massage. Pressure Sing. Pt Has not slept.
				Sat Oct 3. 23		Pt awake. Lum massage Pt Slept 1 hour. Head rather aggressive.
	11th	20	20		Soft Diet Breakfast	Relished
				Pol Sod Bic Sat 5d in 1 glass. 5 m.c. t. d. p. s.		55 Enema Liver returned Every good results Sponge with Lt. Lumb Lt. Side of body massaged Heat applied. Ice Command Pt Sat. up. Pt walked several steps
		23	Dec.			
	3rd				Soft Diet Supper	Relished

Kansas City

PLAINTIFF'S EX. 4N

213 = 214

CLINICAL RECORD

Myrtle Saunders

Soft diet

Pt slept

PLAINTIFF'S EX. 4N

Date 4/12 — Date 10-5-21 — CLINICAL RECORD — Dr. Sanders — Myrtle Johnson — Table Lamp — 18131

Time	Pulse	Resp.	Temp.	Date	MEDICINE	NOURISHMENT	REMARKS
						Soft diet Supper	Rel. sled.
4P	72	24	18		.5S Enema		Good results.
						Soft Diet Supper	Ate well Ft. resting
							Hot Tub bath. Abe. massage.
					Sleep		
12P							Ft. Sleeping
					Mon. Oct 5. 1921		
8A							Ft. slept well Enjoyed N. Xe
8A	72	20				Soft diet Breakfast	Gen. Rm care. Sponge bath. Abe. Massage. Ab. Sandbag to a Irrigation Clear.
					N. S. qts X		
						Soft Diet Dinner	
							A. Examined Ft. Sleeping.
4P	72	20					

PLAINTIFF'S EX. 4-0

412 — 10 6 33 — 1st — Mr. Johnson — Belleville

9						Soft Diet Supper	Tak Sick. Up in Chair. Pt is not so dizzy while walking. Is comfortable.
9:45					65 Enema		Used stool. Pt up about in Chair. Walked Some seems To manage herself & Walker sat. Nature. Sleeping
7					Have Got a nap		Slept well. Night nurse
11	11:20					Soft Diet Tray up	Ate well. Chicken
					Pt Left with IC-A -- Rm. 12		
8							Given Rub. Bath. Massage.
						Soft Diet 5 p.m.	Refused
3							

N K H

219=220

PLAINTIFF'S EX. 4P

CLINICAL RECORD

412 Ward

K 725 Bed No. 11 Name Mrs Johnson Name Edelberg

Date	Temp.	Pulse	Resp.	Urine	Bowels	MEDICINES	MOVEMENT	MEMORANDA
								Bathing
							Soft Diet Supper	Relished articles. Can walk. Ate both meals. Can hardly any help.
								Temp'd about in chair. Had tub bath. Has Massage Sleeping
						Incision Irrigated		
						Med Oct 7, 1925		Large scald Dressed with Boric well Normal saline
							Gen. diet	Gen. M. m. Care. Ele. massage Bathing
						Left Lodic with Boric Wet Dressing		
								To Toilet. Large amount soft Stool.
							Gen. diet Dinner	Ate well

Nurse

Patient's Number

Form 30 Lewis Brothers Company, Kansas City, Kansas

PLAINTIFF'S EX. 40

4/2 — 4th CLINICAL RECORD Mrs Johnson — Ellsberg

							MEDICINE	NOURISHMENT	REMARKS
									Th 5am days Urine Red pt. Pr to bath
4									
								Gen. d.et Supper	Ate well. Liquid diet
7									Temp. norm
9									Ate milk toast. also Milk Custard
							Thermal 2. P.M.		
12									Appl well liquid diet
8								Eggs d.et	Genl. M. Liver. also mush
							161. Sed. deg. 1 — plain Hb		
8								Gen. d.et Dinner	Ate well Bath
4								Eggs d.et Supper	Pulse 84
									Ate mush & liquid diet

Bath

May go home in A. M.
To Dr Sanders
Dr. Mrs Ellsberg

223=224

PLAINTIFF'S EX. 4R

CLINICAL RECORD

Mr. Graham

Saunders

Date	Temp.	Pulse	Resp.	Urine	Diet	MEDICINE	MOVEMENT	TREATMENT
10/4								Ex. Care Hot Tub with Vic. Massage to Bed.
10						Inhaler 1/2		Sleep well Comf. Nite.
11							Comfort Transport.	Genit. m. Care. Dr. massage Social Call. Dr. Gone Home

Name

Patient's Address

Form 30 Lucas Brothers Company, Kansas City, Kansas

The Witness: That is the same: KI is potassium iodide, drops five.

Mr. Marley: "9, 12, 3 and 6;" and they were all given. Now, then, the next one is exhibit 4-O; potassium iodide, grains five.

The Witness: Drops five.

Mr. Marley: I mean drops five; 10, 1, 4, 7 and 10; all given. Striking that line through indicates that that was given.

The Witness: Yes.

Mr. Marley: Now, then, exhibit 4-P, potassium iodide, drops five in a glass of water, is that?

The Witness: Yes.

Mr. Marley: And 9:30, 12:30, 3:30, 4:30 and 8:30; all given.

The Witness: Yes.

Mr. Marley: Then is that Q? Yes, that is Q. Potassium iodide, drops five in a glass of water, 9, 12, 3, 6 and 9; all struck through. They were all given. That is right, isn't it?

The Witness: Yes.

Mr. Marley: Exhibit 4-R doesn't have it; but that, your honor, with those abbreviations, I will have no objection to their going in.

Mr. Chilcott: Now, was it your honor's notion that I read those, or the witness?

The Court: Well, if you want to read it, or you can read the parts you think are of some value, or you can use it in the argument as in evidence.

(Which said documents, so offered and introduced in evidence as plaintiff's exhibits 4-L to 4-R, both inclusive, are in words and figures as follows, to-wit:)

(Here follow Exhibits 4-L, 4-M, 4-N, 4-O, 4-P, 4-Q, 4-R, marked side folio pages 211 to 224, inc.)

[fol. 225] By Mr. Chilcott:

Q. Now, Mrs. Ellsberry, when you first started to wait upon Mrs. Johnson what was her appearance?

A. Well, how do you mean? Her general appearance?

Q. How was her physical appearance to you?

A. Well, her limb and arm were lifeless, and the side of her face was drooped; rather drawn.

Q. What direction?

A. Well, downward, the side of her face.

Q. Do you recall which arm and limb it was?

A. It was the right arm and limb.

Q. State how she progressed from day to day. What did she do the first day that you waited on her?

A. I don't know just about the first day.

Q. Where was she?

A. She was in Grace Hospital, in bed.

Q. In bed. How long did she remain in bed?

A. Well, she remained in bed all the time except when I had to remove her to the bathroom at night.

Q. And how did you do that?

A. Well, I had to lift her as best I could. She tried to help herself but she couldn't.

Q. Did she appear to be able to walk?

A. No, she couldn't walk.

Q. What did you notice in regard to her speech?

Q. Well, she couldn't talk plain. I couldn't understand her. She would try to tell me two or three times, and then I would tell her she didn't know what she was talking about.

Q. How long did that condition continue?

A. Well, it continued all the time that I was there on the case.

Q. And how long were you on the case?

A. I was on the case—well, it was around a week.

Q. And how did her arm and leg feel to the touch?

A. It was cold.

Mr. Chilcott: That is all; you may take the witness.

Mr. Marley: That is all.

(Witness excused.)

Dr. Paul B. Clayton was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

[fol. 226] Direct examination.

By Mr. Wickersham:

Q. What is your full name, please?

A. Paul B. Clayton.

Q. What is your profession?

A. Doctor of medicine.

Q. Doctor, have you at all specialized as a roentgenologist?

A. I have; yes, sir.

Q. For how many years?

A. Exclusively for the last seven years.

Q. And were you on the 29th of September, 1925, connected as a roentgenologist with the Grace hospital of this city?

A. I was.

Q. I show you plaintiff's exhibit 4-D and ask you if that is the original report that you made as roentgenologist of Grace hospital of Mrs. Myrtle Johnson.

A. It is.

Q. And were you on the 29th of September, 1925, con- that you took of her skull at that time?

A. I have.

Q. Will you exhibit them, please?

A. Plates made of the left side of the skull.

Q. Are both of those you have in your hand made of the left side?

A. Both sides of the skull.

Q. Both sides. Which is the left?

A. That is the left, and that is the right.

Q. Is this one the right?

A. That is the right side of the skull.

Mr. Wickersham: Please mark that one.

(Document marked "Plaintiff's Exhibit 5.")

Mr. Wickersham: I offer plaintiff's exhibit 5 in evidence.

Mr. Marley: That is the right side of the skull, I believe.

The Witness: That plate is.

Mr. Marley: I object to it as incompetent and having no bearing on the issues in this case. I concede that the left skull, where the injury is supposed to be inflicted, is competent, and I would like to have it in evidence.

The Court: Overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Rail-

road Company by its counsel then and there at the time duly excepted and still excepts.)

[fol. 227 & 228] (To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

(Which said X-ray plate, so offered and introduced in evidence as "Plaintiff's Exhibit 5," is in words and figures as follows, to-wit):

(Here follows Exhibit 5, marked side folio pages 229 and 230)

[fol. 231] Mr. Wickersham: Mark this one now, please.

(Plate marked "Plaintiff's Exhibit 6.")

Q. Now, this plaintiff's exhibit 6, is that picture of the left side of Mrs. Johnson's skull?

A. That is the left side of the skull.

Q. In head injury cases it is your usual custom and ordinary practice to make pictures of both sides of the skull?

A. It is.

Q. Doctor, did you read those pictures after you took them?

A. I did.

Q. Does the word "reading" mean to ascertain whether there was any fracture of the bony structure?

A. Yes, sir.

Q. What did you find?

A. Found no evidence of fracture.

Mr. Wickersham: I offer in evidence the report of Dr. Clayton, which is plaintiff's exhibit 4-D.

Mr. Marley: That is objected to as incompetent. He is here testifying.

The Court: The objection is sustained.

Mr. Wickersham: Very well.

Q. Doctor, why do you take pictures of both sides of the skull?

A. There are times when an injury sustained on one side of the skull will produce a fracture upon the other side of the skull; contrecoup fracture.

Mr. Wickersham: That is all; you may examine.

229-230

PLAINTIFF'S EX. 5

PLAINTIFF'S EX. 6

Cross-examination.

By Mr. Marley:

Q. Now, Doctor, this right side of the skull I believe is exhibit 5. Is that the right or left side of the skull?

A. It is the right side.

Q. Now, then, do you see there any indications of fracture at all?

A. No.

Q. Do you see there any indication of any protuberance of any kind; thickening of any kind?

A. No, sir.

Mr. Wickersham: You mean of the skull itself?

Mr. Marley: Yes, of the skull itself. Exhibit 5, which is the right side of the skull.

Mr. Wickersham: Yes.

[fol. 232] By Mr. Marley:

Q. Now, Doctor, I will ask you to examine this exhibit 6, which I believe you say is the left side of the skull. Somebody has scratched that, have they; it has been marred?

A. Yes.

Q. Looks like somebody scraped it; but, now, look at that and see if you can see anything there that shows a projection or protuberance of any kind on any part of the skull that is out of its proper position?

A. It is a perfectly normal skull.

Q. It is a perfectly normal skull?

A. From an X-ray standpoint.

Mr. Marley: All right. That is all, Doctor.

(Here follows Exhibit 6, marked side folio pages 233 and 234)

[fol. 235] Redirect examination.

By Mr. Wickersham:

Q. I forgot to ask you, Doctor, what did you observe on the left side of this woman's head when you took these pictures?

A. I have no recollection of having examined her head, excepting under the x-ray.

Mr. Wickersham: That is all.

Mr. Marley: That is all, Doctor.

(Witness excused.)

WALTER C. CHANEY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. State your name please?

A. Walter C. Chaney.

Q. What is your profession?

A. Physician.

Q. How long have you been a physician?

A. Twenty-four years.

Q. Are you a regular licensed physician in the State of Missouri?

A. No, sir, I am not licensed in the State of Missouri.

Q. You are not practicing that portion of the profession here?

A. I am doing X-ray work at the Grace Hospital at the present time.

Q. How many years have you devoted to the X-ray business in your profession?

A. Twenty-one or twenty-two years.

Q. During the time that you mention, have you taken a great many pictures of X-ray?

A. Yes, sir.

Q. It will run into the thousands?

A. Yes, I think so.

Q. Doctor, as a part of your profession, did you, and do you read the pictures?

A. Yes, sir.

Q. Doctor, are you now connected in any way with the Grace Hospital in this city?

A. Yes, sir.

Q. What doing?

A. Doing the X ray work at Grace Hospital at the present time.

Q. And have been for how long?

A. Since the first of January.

[fol. 236] Q. Doctor, did you recently take some X-ray pictures of the skull of Mrs. Johnson, the plaintiff?

A. Yes, sir.

Q. When did you do that?

A. Sixteenth day of February, 1927.

Q. Have you those pictures with you?

A. I have.

Q. Will you please exhibit them?

A. Yes, sir.

Mr. Marley: That is this year?

A. 1927, yes.

Mr. Wickersham: Mark this one.

(Whereupon said instrument was by the reporter marked for the purpose of identification plaintiff's exhibit 7.)

Q. Now, I show you plaintiff's exhibit 7, and ask you if that is one of the pictures you took the other day of her?

A. Yes, sir.

Q. On what side of the skull is that?

A. Right side.

Mr. Wickersham: Mark this one.

(Whereupon said instrument was by the reporter marked Plaintiff's Exhibit 8, for the purpose of identification.)

Q. And plaintiff's exhibit 8, is that one of the pictures you took?

A. Yes, sir.

Q. What side of the skull is that?

A. Right.

Q. Both pictures the right side?

A. These are both the right, yes, sir.

Mr. Wickersham: Mark these, please.

(Whereupon said instruments were by the reporter marked Plaintiff's Exhibits 9 and 10 for the purpose of identification.)

Q. Now, I show you plaintiff's exhibit 9, and ask you if that is one of the pictures you took, and which side of the head is it?

A. Yes, sir; left side of the head.

Q. Exhibit 10, is that one of the pictures you took, and which side of the head?

A. Left side of the head.

Mr. Wickersham: I offer the last four mentioned photographs in evidence.

Mr. Marley: Now, if your Honor please, we object to them being introduced in evidence, because they are taken too remotely from the time of the accident. The evidence has developed that Myrtle Johnson had several different doctors and several different kinds of treatment. Now [fol. 237] unless they show that nothing intervened to change the condition of her brain, or by virtue of the treatments given to her by the various doctors, that would be incompetent, because it would embody any mistakes they made in the diagnosis of her case, and we object as incompetent for any reason.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts:

By Mr. Wickersham:

Q. Now, Doctor, have you a machine out at your laboratory in which you place these pictures to read them?

A. Yes, sir.

Q. What do you call that machine?

PLAINTIFF'S EX. 7

239-240

Plf. Ex. 7

PLAINTIFF'S EX. 8

241-242

PLAINTIFF'S EX. 9

243=244

245= 246

PLAINTIFF'S EX. 10

PTF EX. 10

A. Stereoscope.

Mr. Marley: Now, if your Honor please, we object to them being introduced in evidence, because they are taken too remotely from the time of the accident. The evidence has developed that Myrtle Johnson had several different doctors and several different kinds of treatment. Now, unless they show that nothing intervened to change the condition of her brain, or by virtue of the treatments given to her by the various doctors, that would be incompetent, because it would embody any mistakes they made in the diagnosis of her case, and we object as incompetent for any reason.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

[fol. 238] (Whereupon, said instruments having been heretofore marked by the reporter for the purpose of identification as exhibits 7, 8, 9 and 10, were received in evidence, and are attached hereto and made a part hereof)

(Under stipulation of the parties hereto, the exhibits above referred to may be photographed and the photographic copies attached to this record instead of the original instruments.)

(Here follow Exhibits 7, 8, 9, and 10, marked side folio pages 239 to 246, inc.)

[fol. 247] By Mr. Wickersham:

Q. Now, Doctor, have you a machine out at your laboratory in which you place these pictures to read them?

A. Yes, sir.

Q. What do you call that machine?

A. Stereoscope.

Q. And what is the object to the use of such machine?

A. In taking certain pictures in the body where we can't get the two at right angles, get the pictures taken at right angles to each other, we take what we call the stereoscope, set the pictures or place the pictures in such position, and by taking a fixed distance from the X-ray tube to the film—we set the machine so that we can move that X-ray tube a certain distance either way from the center, and we take two pictures made at the different angle and we put them in this dark box, one on either side, and with reflecting glasses, we view the two pictures as one.

Q. And what sort of a view do you get by the use of that machine and of the mirrors you employ in it?

A. That is to give us depth of a picture so that we can determine, instead of just a flat picture, rounds them out, and brings them to their natural shape.

Q. So, I understand you take the left and right side of the skull, these pictures, and put them some distance apart, and by looking into mirrors with electric lights you use, you get a rounded view of the skull?

A. Take two pictures of the left side, and put them together and it gives us a rounding view, so that we are looking into the skull.

Q. Now, did you do that with these pictures I have offered in evidence?

A. Yes, sir.

Q. Did you read them?

A. Yes, sir.

Q. Please tell the jury what you found if anything upon the left side of the skull?

Mr. Marley: We object to that because it embodies something that is not here. Now, if he will bring this machine, so that we will have a chance to verify his reading, well and good, but these other experts that have been called in, nothing has been said about this kind of a "scope" and we object, incompetent, and doesn't give us the proper opportunity to test out his testimony in that regard.

The Court: Overruled.

Mr. Marley: Note the exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central

[fol. 248] Railway Company, then and there, at the time, duly excepted, by its counsel, and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted, and still excepts.

By Mr. Wickersham:

Q. Go on and tell us Doctor.

A. On the left side of the skull in this case there is a building up process in the region of the anterior part of the region on th- side of head, the parietal bone which is back of the juncture of the frontal bone and well up toward the curve on the top of the head, there is a lack of a shadow due to the thickening there, thickened condition.

Q. Now, I want you to take a picture the one you have of the left side of her skull, and indicate to us where you find this thickening, if you can, with the light that is here.

A. Too much light. In this region here, we got a white area here surrounded by a more dense area on this picture, that we don't get on the right side of the head. We got the same thickened white area on the two pictures in the same place on the left side of the head.

Q. Now, you have indicated here before the jury a lightened spot there which is near the top of the skull. At this point—am I indicating the point there?

A. Yes, sir.

Q. Now, what does that indicate to you as a Roentgen Ray expert, and devoting your time, as you have to that? Roentgen Ray expert of 21 years of experience?

A. That there is more dense area the other parts of the bone, and lights fail to go through to darken the film.

Q. Now, Doctor, what if any effect could that thickness, that thickened area have upon the motor nerves of the brain?

Mr. Marley: Object, incompetent. It is not shown that he is qualified as to the effect on the motor nerves, he is a Roentgen Ray expert and devotes himself exclusively to that.

The Court: Objection sustained.

By Mr. Wickersham:

Q. Is it part of your business in reading these prints over this period of years to determine what effect any thickening of the membrane or bone in the skull may have upon the brain of a person whose pictures you take?

A. Yes, sir.

[fol. 249] Q. That has been your profession for over twenty years?

A. Yes, sir.

Q. And is that one of the reasons you take these pictures to determine what if anything may be the cause of certain conditions which you find.

A. Yes, sir.

Q. Now, with that twenty-one years' experience, what would or what did that thickened area that you found in these pictures indicate to you with this patient?

Mr. Marley: I wish to ask a few questions.

By Mr. Marley:

Q. Doctor, you have been confined to taking these pictures, have you not?

A. You mean these?

Q. And your experience in taking X-ray pictures, you have not studied the patients, studied their nervous conditions have you in connection with taking the X-ray?

A. Well, I did general work for a number of years.

Q. I know, but how many years ago?

A. I have been practicing medicine for twenty four years.

Q. But how many years have you practiced it in Missouri?

A. I have only practiced in Missouri, in fact, I am not practicing medicine in Missouri now.

Q. How long have you been devoting yourself exclusively to X-ray work?

A. Just since the first of the year, exclusive to X-ray.

Q. Prior to that time, how long has it been since you studied the nervous system of the human body and the effects of the thickening of the skull on the nervous system and on the brain? What has been your experience in that?

A. I have been studying it and reading for twenty-four years.

Q. Have you had patients to examine?

A. Yes, sir; a good many of them.

Q. And after you had examined them, you would take X-ray and find these indications?

A. Work with various patients in which we made the X-ray as a part of the study to determine the trouble.

Q. And you have had cases like this?

A. Very similar to this; I couldn't say exactly like this, but skull cases, where we were dealing with pressure.

Q. What I am getting at, were you dealing with the nervous side as a physician, or the other side as an X-ray man?

A. Up until the first of this year, I did both general work and X-ray work.

Q. All right.

[fol. 250] Mr. Wickersham: I think his qualifications are ample, Your Honor.

The Court: Yes. But, can you tell, Doctor from these pictures, how much of a thickening there was there, and if so, of course you can answer the other question. The plates don't show, he don't know anything about the quantity of the thickening.

By Mr. Wickersham:

Q. Can you tell from reading these pictures the quantity of the thickening that might have any effect upon the motor nerves?

A. It is impossible to say the exact thickness of the built up portions here in this picture from any X-ray.

Q. I am not asking you to be exact about it down to the millionth part of an inch, or anything of that sort, but is it part of your profession to take these pictures and read these plates and determine what, if anything, what if any effect the thickening that you might find may have upon the patient? Is that part of your business?

A. Yes, sir.

Q. Has been for years?

A. Yes, sir.

Q. Now, in order to carry out the idea of the Judge. Is there any thickness there sufficient in your opinion to cause any effect on the motor nerves of the brain?

Mr. Marley: Object, because we don't know and he don't know what the thickness is, and until he does, he could hardly know what the effect would be.

The Court: He can answer that question. Read the question.

(Question read as above recorded.)

A. Yes, sir.

Q. Doctor, would——

Mr. Marley: Exception, your honor, please.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel, then and there at the time duly excepted and still excepts.

[fol. 251] By Mr. Wickersham:

Q. Doctor, would violence applied to the left side of the skull at the point where you indicated there is a thickening, in your opinion cause or might cause a paralysis of the right side of the body?

Mr. Marley: Objection, incompetent, and too broad in its scope.

The Court: Overruled.

Mr. Marley: Note the exception.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the Court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. Yes, sir.

Mr. Wickersham: Are the nerves of the head and body so arranged that an injury to the nerves on the left side

of the head at the point indicated, would naturally effect the motor nerves on the right side of the body that control the movements of the right arm and leg?

Mr. Marley: Objected to as incompetent. May be I wouldn't object if I understood the question. Read the question.

(Question read as above recorded.)

Mr. Marley: I will withdraw my objection on that.

A. Yes, sir.

By Mr. Wickersham:

Q. Now doctor, did you likewise read the X-ray pictures that were taken shortly after Mrs. Johnson went to the hospital?

A. I did.

Q. And tell the jury now, from reading those, did you find there was any fracture of the bone structure?

A. There was not.

Q. Now then, the time that elapsed from the 29th of September, 1925, until the 16th day was it?

A. Yes, sir.

[fol. 252] Q. Of February, 1927, that much time, your reading of those pictures taken first show no fracture of the skull. You have told us what the reading was of your pictures that you took on the 16th of this month. Now, can you explain to this jury the presence of this pressure, of this thickening in the pictures that were taken a few days ago, which were not in the pictures taken a year and a half ago?

Mr. Marley: Object to it as incompetent. It is too broad in its scope and omits certain elements. There is no evidence here that there was nothing happened between that time and this, as far as he is concerned, he is assuming a great deal.

The Court: That is a proper subject of cross-examination and the objection is overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York [—] Rail-

way Company by its attorneys, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. I am going to withdraw that question it isn't framed properly. Did you find in these pictures that were taken on the 29th of September, 1925, any evidence of thickening such as you find in the pictures that you took?

A. No, sir.

Q. That length of time had elapsed. Will you explain to the jury how it comes about that you can have a thickening as shown in those pictures such as you have testified to in February, 1927, that isn't shown in the picture of September, 1925?

Mr. Marley: Object; incompetent. The witness has not shown himself familiar with the situation and facts upon which to base an opinion, and it would be merely conjecture as far as he is concerned.

The Court: Overruled.

Mr. Marley: Exception.

[fol. 253] To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. I will have to answer that from the things that usually take place following an injury to the head such as she was supposed to have had here. A slight hemorrhage under the periosteum of the skull on that side would become organized and form a slight bony plate on the inner side of the skull; or the injury may have been to the covering of the skull—covering of the brain. I mean, in which you get a thickened hardening of the dura mater of the brain.

Mr. Marley: I object to that. There is no evidence here of the thickening of the dura mater of the brain, but to the pia mater of the brain, on the inside and not the outside.

Mr. Wickersham: I know, but who says so.

Mr. Marley: I take it the witness is undertaking to testify with reference to the things that you have been developing in evidence in this case, and not roaming over the realm of speculation to base his opinion.

The Court: I understand he is trying to explain the difference between these two pictures, showing the difference or these two different dates.

Mr. Marley: Now, in undertaking to explain that difference, he goes beyond and gives a reason other than that indicated by the testimony in this case.

The Court: According to the Court's opinion, his answer is in the realm of propriety under the law and evidence, and the objection is overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there, at the time duly excepted and still excepts.

[fol. 254] To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel then and there duly excepted and still excepts.

By Mr. Wickersham:

Q. Go on, Doctor.

A. In either case the thickening, the X-ray picture would show on the side of the skull as if it was fastened direct to the skull, whether it was on the inner side of the skull, a thickening up of the bony structure due to hemorrhage or whether due to a lick causing the membrane to come back and hit the skull, or thickening of the dura mater, either would make a thickened tissue for the light to go through, and consequently there wouldn't be a shadow produced.

Q. Now, Doctor, does it take any appreciable period of time for this thickening to take place and grow there? In other words, may you have a blow received upon the left side of the head at the point we have in mind, on the 27th

day of September, 1925, and cause some lesion to the dura mater or pia mater, of the tissues of the brain, with a resultant hemorrhage and a thickening of the part that is injured by this lesion, not taking place for some time, some period of time afterwards, after the reception of the blow?

Mr. Marley: That is objected to as incompetent, and omitting matters that ought to be included in the question. This witness, as I understand it, has not shown himself familiar with the condition of this patient excepting to the extent of having taken an X-ray of the skull, and along the line of testimony that they are trying to bring out now, if he had examined the witness and was familiar with it, or he would take the history of the case, then he might be in a position to express the opinion that they are asking him now, but I don't believe he is in a position now to answer that question, as a competent expert, and object to it for that reason.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Rail-
[fol. 255] way Company, by its counsel then and there at the time duly excepted and still excepts.

A. It would take some time for the organization of the clot to form a new tissue which would cause a thickening.

Mr. Marley: Move to strike that out as incompetent, too broad in its scope and too indefinite.

The Court: Motion overruled.

Mr. Marley: Note exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Rail-

way Company, by its counsel then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Have you taken pictures of patients with skull injuries at various periods of time after reception of the injury?

A. Yes, sir.

Q. Have you noted in your long experience of twenty-one years that there may be a clot of scar tissue lesions in the brain?

A. Yes, sir.

Mr. Marley: Object to that as incompetent, because in order to make those things competent, there should be a similarity of situation. I don't believe he can go and speculate as to any kind of injury. I don't understand he is trying to qualify the man. What he is trying to do is to get the opinion of a man on a situation that is here before the jury and yet is asking him questions on a situation that is not similar at all, and I object to it for that reason as incompetent.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Rail-[fol. 256] way Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. You may answer.

A. Yes, sir.

Q. So that we may understand ourselves clearly, your experiences have been over a long period of time, taking pictures——

Mr. Marley: Object to leading the witness.

The Court: Sustained.

By Mr. Wickersham:

Q. All right, I won't transgress the rule. Is it true that pictures taken at one time of a heady injury where there has been a lesion of the tissues will not show any thickened area which later on taken of the same patient may show it?

Mr. Marley: Object as leading, calling for a conclusion of the witness, suggestive.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

A. Yes, sir.

By Mr. Wickersham:

Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was on a train and standing in the aisle of a Pullman, holding onto a curtain of a berth, and there was a sudden lurch of the train which threw her around forward as the train was going so as to strike her head against the upper berth, and she was thrown to the floor, and that she was dazed at the time crying "Oh my head, oh, my head," and then later, oh something perhaps an hour or two afterwards, she was put to bed and went to sleep, and this occurred between eleven and twelve o'clock at night, and next morning, shortly before noon, when she was awakened, that there was a partial paralysis [fol. 257] of the right leg and side and arm and a twisting of her face, and an inability to speak plainly, and then she was brought from New York, where it happened, State of New York, to Kansas City, and out to the Grace hospital, and these pictures were taken on the 29th day of September, as you have read them, and then her paralysis of the right side got some better so that she could use her right hand and arm and leg somewhat better, and her speech im-

proved some, and then you took these pictures of her on the 16th day of this month, and that there is that thickened area which appears in the picture that you took a few days ago, and does not appear in the pictures that were taken on the 29th of September, 1925. Is that any indication to you as a professional man of the growth of any scar tissue in the covering of the brain?

Mr. Marley: Object to that as incompetent and including elements that I don't think ought to be in the question, and I object to it for that reason.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. What is your answer?

A. Yes, sir.

Q. Now, Doctor, I will ask you if in your opinion this thickening there which you have described, could in your opinion be caused by the blow and violence indicated in my last question?

Mr. Marley: Object to the question for the same reasons heretofore given for previous questions similar to this.

The Court: Overruled.

Mr. Marley: Exception.

[fol. 258] To which action and ruling of the court the defendant in case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel, then and there, at the time, duly excepted and still excepts.

A. I think so.

Cross-examination.

By Mr. Marley:

Q. Doctor, I believe you say you don't practice medicine in Missouri?

A. No, sir; I am not licensed in Missouri.

Q. Where did you practice medicine?

A. Independence, Kansas.

Q. Independence, Kansas?

A. Yes, sir.

Q. When did you leave there, how long ago?

A. I broke my office up there on the 2nd day of December.

Q. Of last year?

A. Yes, sir.

Q. And came here?

A. Yes, sir.

Q. How long did you practice medicine in Independence, Kansas?

A. Since April 4, 1903.

Q. You put in all your time there at Independence, Kansas.

A. All except about four months that I was in the army during the world war.

Q. Now, where did you get this experience that you are speaking about with reference to dealing with injuries to nervous system and to the brain cells?

A. As both doing general work and doing X-ray work.

Q. At Independence, Kansas?

A. Yes, sir.

Q. Did you find many people down there suffering from blows on the skull that affected the brain and thickened the skull and affected the nerves?

A. I don't know what you would call many. I have seen a good many cases.

Q. At Independence, Kansas?

A. I couldn't tell you just how many.

Q. Can you give us an idea?

A. I would not even attempt it.

Q. As many as ten?

A. I presume more than that.

[fol. 259] Q. Twenty-five?

A. I wouldn't like to say, I don't know.

Q. Now, when you came to Kansas City here, you started in there at Grace Hospital, and you have devoted yourself exclusively to that, taking roentgen ray pictures?

A. Not exclusively, because I have charge of our physiotherapy out there; electric light and treatment of cases in that way.

Q. You never examined this patient at all, Myrtle Johnson, to [—] over her to ascertain her condition?

A. No, sir; I did not.

Q. So that all you know is what you have answered with reference to these hypothetical questions?

A. That is all I know relative to her condition, yes, sir.

Mr. Marley: That is all.

(Witness excused.)

W. J. Connor, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. State your name, please, Doctor?

A. W. J. Connor.

Q. What is your profession?

A. Osteopathic physician.

Q. How long have you practiced your profession?

A. Thirty years.

Q. How long in the city of Kansas City, Missouri?

A. Twenty-seven years.

Q. And where are your offices?

A. In the Commerce Trust Company Building.

Q. Now, Doctor, you know Mrs. Myrtle Johnson, the plaintiff in this case?

A. Yes, sir.

Q. Have you treated her professionally?

A. Yes, sir.

Q. Have you refreshed your recollection from your books as to the dates on which you treated her?

A. Yes, sir.

Q. State them to the jury, please?

A. During 1925, through October and November.

Q. How many times did you treat her?

A. Some four or five times, I don't know just how many, five or six times, I don't know just how many.

[fol. 260] Q. So that I may not forget it, may I ask you for the reasonable value of your services for the attendance you gave her?

A. I charged her $4.00 a visit when I went to the house, and I went to the house twice, and she came to the office about three times, and I charged $3.00 for that.

Q. $17.00. Now, Doctor, in the beginning of your treatment of her, you obtained a history that would enable you to treat her?

A. Yes, sir.

Q. What history did you obtain?

Mr. Marley: Object as hearsay. I believe you said you are an Osteopath. I object to any history obtained as hearsay and incompetent.

The Court: Sustained. Not because he is an osteopath, but because it is hearsay. It is all right to say she gave him a history of the accident.

By Mr. Wickersham:

Q. Did she give you a history of the accident?

A. Yes, sir.

Q. Now, what condition did you find her in?

A. I found her paralyzed in one side.

Q. What about her speech?

A. Well, half of her tongue is paralyzed too.

Q. Half?

A. Yes, sir; half of her body. I think it was the right side below the neck, and left side above the neck.

Q. What treatment did you give her?

A. Manipulation.

Q. Now, Doctor, assuming that on the 27th day of September, 1925, Mrs. Johnson was in a normal condition of health, has been on a trip from Kansas City to Los Angeles and San Francisco, Victoria, Vancouver, St. Paul, Chicago to New York, attending to business, convention, and to purchase certain appliances for hair dressing, and walked about

actively and freely, and on the night of September 27, 1925, she was riding in a train going from New York to Chicago, somewhere between eleven and twelve o'clock at night while in a pullman, standing in the aisle adjacent to her berth and holding with her right hand to the curtains near the parti tion of the next berth behind it, facing in a general direction the way the train was going, and that there was a sudden lurch of the train, and that she was thrown forward and around and struck the left side of her head against the upper berth, and was thrown to the floor, and that she was [fol. 261] in a dazed condition and crying "Oh my head, oh my head," and that she was then picked up and put on the edge of the berth a little while and then taken back to the ladies' dressing room, and in a short while water was put upon her face, and she was undressed and put night clothes on, and taken back to her berth, and in an hour or so got to sleep, and next morning late, or about noon when she awakened, the right side was paralyzed, unable to move the right arm and leg, and it was cold and clammy and that her face was drawn down on the right, and inability to talk plainly, and she left the train in Chicago in the afternoon, taken off the train and put in a wheel chair, and later put upon another train and brought to Kansas City to the Grace Hospital and remained there for some nine or ten days, and during that time she was paralyzed as I have indicated, and there was some improvement in the use of her right side, and improvement in her speech, to some extent, and that she was released from there and went to her home, and then was in the condition you have described. I will ask you sir, if in your opinion as a physician, the blow and violence which I have indicated in this question, in your opinion was sufficient to cause this result which I have indicated?

Mr. Marley: We object, incompetent. He hasn't shown himself qualified to answer questions in reference to nervous diseases and brain diseases. As I understand he is an osteopath, and as I understand, he is dealing with the bone situation rather than the nerve and blood vessels and tissues of the body and brain, and in addition to that, it involves improper elements.

Mr. Wickersham: Will you indicate what it is?

Mr. Marley: My contention is that the detail of being carried in a chair and all these other minor matters are not

elements to be included in the determination of whether or not her condition was caused by a blow.

The Court: Doctor, keep this question in your mind so that it won't be necessary to repeat it.

By Mr. Wickersham:

Q. Now, Doctor, there is some question raised as to the qualification you have to answer that question. I want you to tell the court and jury what experience you have had with head injuries and patients who are paralyzed partly so, hemiplegia and the like.

[fol. 262] Mr. Marley: I object to that, people can have hemiplegia and all, different strokes of paralysis without being affected with injury at all.

Mr. Wickersham: I want to get his experience.

The Court: Show first his qualification and then his experience.

By Mr. Wickersham:

Q. Tell us what school you are a graduate of?

A. I am a graduate of the American School of Osteopathy of Kirksville.

Q. And in that school, are you required in your course of study, to make a full and exhaustive study of the nerves and bones and muscles and other parts of the body?

Mr. Marley: Object.

The Court: Objection overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. Yes, sir; we study any part of the body just as thoroughly as in any medical school in the world.

Q. And did you do so?

A. Yes, sir.

Q. And graduated?

A. Yes, sir.

Q. Now what has been your experience in the treating of traumatism, traumatic cases?

A. They are very rare; not seen many traumatic cases. I have seen plenty of older people, but it is unusual, a traumatic injury of that kind is not usual.

Q. But that does happen?

A. It does happen.

Q. Now, what experience now, have you had to enable you to determine the cause and effect of paralytic conditions?

Mr. Marley: I think your Honor, it is about traumatic conditions. It isn't a question of any other condition, but a question of traumatic condition.

[fol. 263] The Court: Limit the condition to a paralytic condition from a traumatic cause.

By Mr. Wickersham:

Q. What experience have you had?

A. I have seen a number of cases.

The Court: Your experience in this connection includes not only the personal cases you have had, but experience of others gained by reading, etc.

By Mr. Wickersham:

Q. In your knowledge and reading and study of text books,—have you done that?

A. Yes, sir.

Q. Are you familiar with the standard works upon anatomy?

A. Yes, sir.

Q. And nervous disorders?

A. Yes.

Q. And books that cover the subject of paralysis?

A. Yes, sir.

Q. And head injuries?

A. Yes, sir.

Q. And you are familiar with the standard works on what is ecology and works on those questions?

The Court: You may answer the hypothetical question.
Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Assuming all those facts I gave you in the hypothetical question to be true, I will ask you in your opinion whether the blow and injury indicated in that question might be sufficient to cause the condition which you have testified to here?

Mr. Marley: Renew my objection so as to keep the record straight.
The Court: Overruled.
Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Rail- [fol. 264] way Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. Yes, sir; it would.

By Mr. Wickersham:

Q. Now, Doctor, have you recently examined Mrs. Johnson?
A. No, not only just to look at her.
Q. Look at her?
A. I have seen her once lately.
Q. How long ago was that?
A. Couple or three weeks ago.

Q. And did you observe the condition and character of her walk?

A. Yes, sir.

Q. And the use, if any of her limbs?

A. Yes, I observed her arm and her walk, and also her speech.

Q. And what have you to say as to her speech now?

A. She can't talk plain, she hasn't good use of her tongue.

Q. And right hand—what use did you observe of that?

A. She hasn't good use of that either.

Q. And the right leg?

A. Nor the right leg.

Q. Now, is there anything in the way she walks, the way she picks up and uses this right leg that indicates to you whether that condition is due to traumatism or due to any disease?

Mr. Marley: Object to that, it is incompetent. He hasn't shown he is familiar with diseases of the kind I think he is alluding to. I don't believe that the witness has shown himself fully qualified to answer the question.

The Court: Objection overruled.

Mr. Marley: Save an exception.

To which action and ruling of the Court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

[fol. 265] A. I get my information wholly from books as I never held a post mortem on a case of that kind.

Q. But from your knowledge of standard works on this, what is the basis of your opinion that there is a hemorrhage of the brain?

A. Well, in this case it was from trauma.

Q. I am trying to get why you are of that opinion.

Mr. Marley: Object to that, as not proper direct examination. It is cross-examination.

The Court: I think it is proper to ask the witness to amplify and explain his answer.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Can you tell the jury why you think that?

A. Well, I would say on account of the history she gave me.

Mr. Marley: Well, I object to that, it is incompetent.

The Court: Let's not go into that.

Mr. Marley: Move to strike that answer out because it was on account of the history she gave him.

The Court: Motion overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Now Doctor, what have you to say, knowing the condition this woman was in when you treated her in October, [fol. 266] and November, 1925, and seeing her condition within a few weeks, as to what is your opinion as to the permanency of this condition?

Mr. Marley: Object, incompetent, don't think the witness has shown himself qualified as an expert to give an opinion on that.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle H. Johnson vs. New York Central Rail. Company, by its counsel, then and there at the time duly excepted and still excepts.

A. She won't ever be well.

Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Doctor, I believe you say you studied under Doctor Stills place at Kirksville?

A. Yes, sir.

Q. And all you know about this condition is what you read in the books?

A. Yes, sir.

Q. And do you find in the books a case similar to this where a party had received a blow by falling and then it developed a condition of this kind after a period of say—at this time of about two years, or a year and a half; where did you find any such thing in the books?

Mr. Wickersham: Let me understand what question he is trying to find out, find what in the books?

Mr. Marley: The basis for his opinion that this was the cause of a blow sustained. Where do you find anything like that?

A. I don't know that I seen any like it.

Q. Did you ever read of a case like that in the books?

A. Well, I have seen cases like it; I never read them.

Q. But, I understood you to say all you knew about them was what you read in the books?

A. Yes, sir; from the symptoms.

[fol. 267] Q. Now, you say all you know is what you have seen in the books, and I want to know what books you saw a case similar to this?

A. I don't remember of any book that I have read it in.

Q. Where did you see a case similar to this in your own experience, other than this one?

A. I have seen several.

Q. Similar cases?

A. Yes, sir.

Q. People that have fallen and hit their head against something and then a period of a year or so, or even two or three days developing paralysis by hemorrhage?

Mr. Wickersham: That question is double.

A. No, sir; a hemorrhage comes in two or three days, comes in a few hours afterwards.

Q. Now, if it comes in a few hours afterwards, how long would it take to absorb that by proper treatment?

A. Well, that absorption takes place gradually, but when the hemorrhage occurs, certain cells in the brain are destroyed.

Q. Bound to be——

Mr. Wickersham: Let him finish.

A. And those cells never regenerate, and the hemorrhage coagulates first—I am giving it to you as I read it in the books, I am telling you I never seen a post mortem of anything of that kind.

Q. You only know what you read in the books?

A. Just what I read in the books. At first that hemorrhage coagulates and clots and then the absorption takes place, and probably takes months for it to absorb.

Q. In order to aid absorption, what kind of medicine do they prescribe?

A. I know nothing about medicine.

Q. You know nothing about medicine?

A. No, sir.

Q. You don't know if there was given a proper medicine it would be absorbed quicker?

A. I know there isn't any medicine given to those people that does absorb it, because no one ever recovered fully.

Q. Did you ever hear of iodide potassium being given for things of that kind?

A. Yes, sir.

Q. And it absorbed it?

A. I never observed a case that it did.

Q. Why do they give it?

A. I don't know.

Mr. Marley: That is all.

(Witness excused.)

[fol. 268] Myrtle J. Johnson, plaintiff herein, called as a witness in her own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please?

A. Myrtle J. Johnson.

Q. Now, Mrs. Johnson, speak up so that the last man on the jury can hear what you are saying. And are you the plaintiff in this case?

A. I am.

Q. And you are the wife of who?

A. Edward H. Johnson.

Q. Now, Mrs. Johnson, in August, 1925, did you make a trip?

A. I did.

Q. Speak as loudly as you can. And where did you go to, Mrs. Johnson?

A. San Francisco and went to Los Angeles and to New York.

Q. How long have you been married to Edward H. Johnson?

A. Married in 1912.

Q. And how old are you now?

A. 32.

Q. And what was your business prior to your injury?

A. I had a beauty shop.

Q. How long had you been operating that beauty shop?

A. I started in November, 1922.

Q. And about how much did you weigh prior to your injury, immediately prior to it?

A. That means before?

Q. Yes, just before your injury.

A. 159 or 160 pounds.

Q. Now, Mrs. Johnson, you were engaged in some kind of work prior to the time, before you were injured?

A. Yes.

Q. What kind of work?

A. I was working in a grocery store.

Q. I mean immediately prior to your injury, the same year you were injured?

A. You mean my beauty shop?

Q. Yes.

A. Yes, I had a beauty shop, and was doing permanent waving.

Q. What kind of work did you do yourself?

A. I did it all, permanent waving mostly.

Q. And state how you do permanent waving?

A. Well, you have thirty-five or forty hangers, all according to how big the head is, and you wrap the hair in little curlers and tie strings on to the hair and wrap the hair around this little curler and put it up in the heater, and have a machine that does that.

[fol. 269] Q. And where was your beauty shop?

A. 4611 Troost.

Q. And in order to do that work, state how you have to use your hands.

A. I can't do it now.

Q. Mrs. Johnson, how long have you been in Kansas City, lived here?

A. About sixteen years.

Q. And state whether or not you moved to Kansas City with your parents about sixteen years ago?

A. I did.

Q. And what has been your condition of health up to the time you took this trip to New York?

A. I have been well.

Mr. Marley: Object to as calling for expert testimony.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted, and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company by its counsel then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. What was your condition of health before you went on this trip?

The Court: She has answered that, said it was good.

Q. Had you ever had a physician to attend you between the time you moved to Kansas City and the time you went on this trip?

A. No.

Q. Tell the jury what sports and athletics you indulged in, if any?

A. I used to play golf.

Mr. Marley: If she is nervous and inclined to give way, I would be perfectly willing to let her rest until tomorrow morning.

A. I will be all right.

By Mr. Chilcott:

Q. Mrs. Johnson, state whether or not you ever played any musical instrument?

A. I played the piano.

Q. Anything else?

A. Saxophone.

Q. Anything else?

A. Used to swim, and target practice.

Q. What other athletics did you indulge in?

[fol. 270] A. Target practice and swimming and playing golf and engaged in almost all athletics.

Q. State whether or not you ever danced?

A. I did.

Q. State whether or not you ever sang?

A. I did.

Q. Now, what kind of color did you have in your face before you went on this trip?

A. The ladies used to remark in the shop when they came in about my complexion.

Mr. Marley: That is incompetent.

The Court: That may be stricken out.

By Mr. Chilcott:

Q. Just state what you observed about yourself.

A. It was good.

Q. Now, Mrs. Johnson, in carrying on your business, I want you to state to what extent you used your hands in carrying on that business?

A. Well, I did all the work, permanent waving and marcelling, shampooing and facials and hair dyeing and electrolysis.

Q. State whether or not it required the use of both hands?

A. It most certainly does, in everything I do.

Q. State with what regularity you attended at your shop and carried on your business, appeared at your shop and did work?

A. You mean how long it took me?

Q. No, whether you were there daily, or weekly or how often you went to your shop?

A. I was there at seven-thirty in the morning sometimes, and worked sometimes until late at night.

Q. State whether or not you were there every day or every other day?

A. Every day.

Q. How many girls have you had working in your shop?

A. I have had as high as eleven.

Q. Now, how did you feel in regard to strength when you left to go on that trip to San Francisco?

A. Well, I felt strong. Strong physically in every way.

Q. How is that?

A. I felt strong and I was physical in every way that I know of.

Q. What was the condition of your nerves?

A. I used to think people were crazy when they talked of nerves.

Mr. Marley: Object to that.

[fol. 271] Q. How did you sleep at nights?

A. I never had any nervous trouble that I knew about.

Q. How did you sleep at nights?

A. Fine.

Q. Do you remember what date you left Kansas City?

A. No, I don't.

Q. Who did you leave with?

A. Mrs. Imogene Johnson.

Q. And where did you go to?

A. I went to attend the convention in San Francisco.

Q. Well, where was your first stop, after you left Kansas City?

A. Grand Canyon in Arizona.

Q. How long did you remain there?

A. I am not sure, but I think we got in there in the morning and left in the evening.

Q. And then you went on to San Francisco?

A. Yes.

Q. I mean to Los Angeles?

A. Los Angeles, yes.

Q. How long did you stay in Los Angeles?

A. I think about three days.

Q. And what did you do while you were there?

A. Well, I was with a girl friend of mine, there, Mrs. Johnson, and we visited a girl friend of ours and she took us around in her car.

Q. And what was your condition of health while you were there, as far as you noticed?

A. Fine.

Q. How did you sleep?

A. Good.

Q. Did you go in swimming at the beach?

A. I did.

Q. Much or little?

A. I think I was in there twice, once or twice, I don't quite remember.

Q. And did you engage in any other sports while you were out there?

A. No, sir; not there.

Q. Then where did you go?

A. Went to San Francisco.

Q. And you went on the boat?

A. Went on the boat.

Q. How long did it take you to go up there?

A. Over night.

Q. How did you feel while going up there?

A. Fine.

Q. Now, when you arrived in San Francisco, you went to the Palace Hotel, was it?

A. Palace Hotel.

Q. How long did you remain in San Francisco?

A. I think it was six days, I am not sure.

Q. And how did you feel while you were there?

A. Wonderful.

Q. How did you sleep?

A. Good.

Q. And did you go around to see some of the sights while you were in San Francisco?

A. Well, I went some, and my business was to bring the National Convention back to Kansas City, and I was engaged most of the time at the convention.

Q. Were you a delegate out there?

[fol. 272] A. No, I wasn't a delegate, I was only working with them to try to bring the convention back to Kansas City.

Q. After you got through at San Francisco, where did you go to?

A. Up to Canada.

Q. Where did you go immediately from San Francisco?

A. I think it was up to Canada.

Q. Did you go to Sacramento?

A. Yes.

Q. And how did you go up there?

A. We went to Lake Tahoe up there, and Imogene's cousin drove us to Lake Tahoe. Went by train over to Sacramento and he met us and took us up to Lake Tahoe.

Q. I notice you hesitate, will you state whether or not your memory is as good as it used to be?

A. No, I forget.

Mr. Marley: Object as incompetent.
The Court: Any allegation of that character?
Mr. Chilcott: Yes, sir.
The Court: Overruled.
Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. Where did you go to from San Francisco?
A. Sacramento.
Q. And how long did you remain in Sacramento?
A. Went up to Lake Tahoe.
Q. Did you indulge in any sports there?
A. Only playing the victrola.
Q. How long did you remain there?
A. Well, I don't remember.
Q. And where did you go to then?
A. Went up to Canada.
Q. And whereabouts in Canada?
A. Victoria and Vancouver.
Q. How long did you remain in those places?
A. I didn't stay all night there.
Q. At either place?
A. No.
[fol. 273] Q. And where did you go from there?
A. Went to Lake Louise and Banff.
Q. And how long did you remain at those places?
A. We didn't stay all night at Lake Louise, but we stayed at Banff a couple of days, I think.
Q. Where did you go from there, did you come on east to New York from there?
A. Yes.
Q. Now, did you have business in New York?
A. I did.

Q. And what was that business?

A. Well, they had a new taxtometer, a machine, fixing how much solution goes in the hair, and how much it takes to make a permanent wave.

Q. And what company did you visit while you were there?

A. C. Nestle.

Q. How long did you remain in New York?

A. About six days.

Q. And then where did you go?

A. I came home.

Q. How is that?

A. I was coming home.

Q. Where was your first stop after you left New York?

A. Chicago.

Q. Did you go to Nyack?

A. Yes.

Q. And how long did you remain at Nyack?

A. One or two nights.

Q. One or two nights?

A. Yes, sir.

Q. And where did you go from there?

A. We was on the way home then.

Q. Do you remember where you boarded the train?

A. Harmon.

Q. And what train was it?

A. New York Central.

Q. Do you remember what accommodations you had on that train?

A. On that train?

Q. Yes. Did you have a berth on that train?

A. Yes.

Q. Do you remember what the number was?

A. Lower 8.

Q. You don't recall the car number. After you got on the train, state what you did?

A. Waited for the train at Harmon, and got on the train and we left our suit cases at the seat, and went back to the washroom and washed and then we came back and went to the diner and had a lovely meal, and we was looking for an observation car, we didn't find any, and we thought we would go in the club car then.

[fol. 274] Q. Before you go any further, I want to ask you to tell the jury how you felt while you were in New York?

A. Wonderful.

Q. How did you feel when you boarded the train at Harmon?

A. I felt good.

Q. How did you sleep while you were in New York?

A. Fine.

Q. What kind of appetite did you have on the train that evening after you boarded it at Harmon?

A. I was sure hungry.

Q. What time did you get through with that meal?

A. That I don't remember.

Q. Where did you go after you got through with that meal?

A. Went to the club car.

Q. How long did you remain there?

A. We played cards, we played rummy and drank lemonade, I don't know how long we stayed there.

Q. Where did you go to from that club car?

A. Back to the berth.

Q. Back to the berth?

A. Yes, sir.

Q. Now, do you recall about what time that was?

A. Oh, it was between the hours of eleven and twelve.

Q. You played cards up there in the club car?

A. Yes.

Q. Now, when you came back, about how far was your car from the club car?

A. Well, several cars back, I don't know how many cars.

Q. And you came on back to your berth?

A. Yes.

Q. You came back to your berth, and tell the jury what you did?

A. Well, I was standing there holding on to the curtain.

Q. Which hand did you have hold of the curtain with?

A. My right hand.

Q. And whereabouts did you have hold of the curtain?

A. Had it just below the upper berth, just holding it below the upper berth and securing it on the board that separates the two berths, and my left hand on my hip.

Q. About how many folds of the curtain did you have in your hand?

A. Several, I don't remember.

Q. What was Imogene doing?

A. Imogene had reached down to get the suit case, and was sitting on the side of the berth, and I was standing there watching her get our night clothes out.

Q. State whether or not your night clothes were all in one suit case?

A. They were, our kimonos and night clothing were all in one case.

[fol. 275] Q. What position was Imogene in?

A. She was sitting in the berth and getting our clothes out of the grip.

Q. Whereabouts were you standing with reference to the foot of the berth?

A. I was just standing at the foot of the berth.

Q. And where was she with reference to the head of the berth?

A. She was sitting up where the pillows were in the berth.

Q. Where was the suit case in the berth?

A. It was a little toward the foot of the berth.

Q. Had it been opened or not?

A. Yes, it had been opened.

Q. Now, while you were standing there holding the curtain as you have described, I want you to tell the jury what happened?

A. The train gave an awful jerk and jolt and a terrible lurch and it threw me to the front a little bit, and I swung around and hit my left side——

The Court: We will suspend at this point for the evening. Gentlemen of the jury, during the recess of the Court, you will not discuss the case and you will comply with the other instructions in that regard that I gave you at noon. I thought it would be more convenient to you gentlemen to have a session tomorrow than to lose an extra day, and I hope you will feel that way about it, although tomorrow is a holiday. So, we will be in session tomorrow, we won't require but one clerk, the other members of the clerk's office need not remain, and only need one bailiff. Be at recess until tomorrow morning at 9:30 o'clock a. m.

Have you gentlemen trial briefs or requested instructions to ask of the Court? If you intend to ask others than what you have handed me, please submit them to me before 9:30 tomorrow morning.

(Whereupon at 5:10 p. m. February 21, 1927, an adjournment was had until 9:30 o'clock a. m. February 22, 1927.)

After Adjournment

February 22nd, 1927.—9:30 a. m.

The Court: Mrs. Johnson will resume the stand.

Mrs. Myrtle J. Johnson, recalled to testify in her own behalf, testified as follows:

[fol. 276] Mr. Marley: Now, if the Court please, I have some of the witnesses here on behalf of the defendant, that I would like to have sworn.

The Court: Let all the witnesses arise and be sworn in this case that haven't been heretofore sworn.

(Witnesses are sworn by the Clerk.)

The Court: The rule has been applied, as being in force in this case, and that means you will stay outside of the court room within call, and do not talk or discuss your testimony around before or after you have given it, except with the attorneys in the case. Remain within call.

By Mr. Chilcott:

Q. Now, Mrs. Johnson, you had told us yesterday, and got as far as standing up besides that berth holding on the curtain. Now, I want you to tell us what happened to you when you were standing there besides that berth and holding the curtain?

A. I was standing there and had several folds of curtain in my right hand, securing myself against the——

Mr. Marley: I object to the securing part. She may state just what she did, but she says, "Securing herself," now, that is a conclusion, I think, and not a part of the

transaction, she can state that she put her hand up and held it.

The Court: I doubt if there is, or if it is any more of a conclusion to use the word "secure" than it is to use the word "held." Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. And I had my hand hold of the curtain just below the lower part of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on hy hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw me head up against the edges of the [fol. 277] upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor.

Mr. Marley: I object to the part, "With such force." She can say what happened, but the words, "Such force," would be a conclusion.

The Court: Overruled.

Mr. Marley: Exception noted.

To which action and ruling of the court, the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time, duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted, and still excepts.

By Mr. Chilcott:

Q. Whereabouts did you fall in the floor, Mrs. Johnson?

A. I fell in the aisle just a little to the left side of the aisle, my back to the engine.

Q. What—and whereabouts with reference to the head of the berth?

A. Well, I fell with my back to the head of the berth.

Q. Was it even with the head of the berth or in front of it or behind?

A. No, just a little to the left, and threw me and I fell over to the side of the aisle.

Q. Were you in front of the partition that separates the head of the berth from the other berth, or were you behind it—were you toward your berth or the other berth?

A. Toward the berth on the other side.

Q. Do you mean the other side of the aisle?

A. Yes, other side of the aisle.

Q. Where did you fall with reference to the head of your berth?

A. Across the aisle.

Q. Directly across?

A. I don't know whether it was directly or not, but I fell over in the left side of the aisle a little bit.

Q. Now, what happened while you were down on the floor there?

A. Everything got black, and I got sick at my stomach, and the next I remember, I was sitting up on the berth.

Q. Do you know how you got up on the berth?

[fol. 278] A. No, I don't know.

Q. What was done to you while you were sitting on the side of the berth?

A. Jene was rubbing my head, and I was crying, waving my head and it hurt so bad.

Q. And how long did you remain sitting on the side of the berth?

A. Just a few minutes, because——

Mr. Marley: Object to the because, as incompetent.

Mr. Chilcott: All right.

A. Went to the dressing room, and Jene washed my face in cold water. I say we went to the ladies rest room.

Q. I heard you, proceed.

A. And she rubbed my head, and set me down in a chair, and then we went back to our berth.

Q. When were you undressed and put to bed, put your night clothes on?

A. Well, Jene brought our clothes back there to the dressing room.

Q. And were you undressed and went to bed?

A. Yes.

Q. Where did you sleep in the berth?

A. Next to the window.

Q. And where did Jene sleep?

A. On the place next to the aisle.

Q. Now, I want you to tell the jury how you slept that night?

A. Well, I didn't go to sleep for a long time, and I was nervous and my head hurt so bad, and it seemed where it hit my head down, it hurt my shoulders and my back and my spine; it all hurt me.

Q. Did you finally go to sleep?

A. I dropped off to sleep some hour, I don't know what time it was.

Q. And do you know how long you slept?

A. No, I don't.

Q. When did you awaken, if you have any idea of time?

A. I woke up sometime in the morning before noon, and I was sitting straight up in the bed.

Q. When you woke?

A. I was sitting straight up in my berth.

Q. Tell the jury what you felt like when you woke up in the morning?

A. When I woke up, the first thing I felt my arm was asleep, and I picked it up, and I found my arm was numb, [fol. 279] and then I can't move my leg, and I felt of my leg and I could not move it, and I thought——

Mr. Marley: Object to what she thought.

The Court: Don't state what you thought.

By Mr. Chilcott:

Q. How did it feel to you?

A. Felt numb and cold, and I couldn't move it, and it never scared me so much until I found out I couldn't talk, and I went to crying, and I woke Imogene up by just pulling at her.

Q. With what arm?

A. With my left arm.

Q. And then what was done?

A. Well, she helped me roll over and she rubbed my back, rubbed my spine, and I got relief form that, and then I guess she went and told the conductor.

Mr. Marley: Object to that.
The Court: Sustained.

By Mr. Chilcott:

Q. You can't state that. Did anyone come around where you were?
A. Come and peeped in the curtain.

Mr. Marley: How is that?
A. They peeped in the curtain.

By Mr. Chilcott:

Q. Do you know who they were?
A. I didn't know them, I wouldn't know if I were to see them.
Q. And you don't you—And do you know whether or not the conductor came there?
A. I think he did.
Q. Did you have any conversation with the conductor?
A. Not me.
Q. Tell the jury how your throat and tongue felt at that time?
A. Just like the right side of my tongue was dead, and it seemed like my words would be cut half in two, I couldn't talk.
Q. Well, how long did you remain in the berth?
A. Well, I don't know.
Q. Did any nurse come to see you there?
[fol. 280] A. There was some lady that came in the berth.
Q. You knew who she was?
A. No.
Q. Well, did you have any breakfast that morning?
A. They brought breakfast to my berth, but I didn't eat.
Q. Tell the jury why you didn't eat?
A. Well, it just seemed like something had hold of me, and I couldn't eat, just couldn't take a bite.
Q. Tell how you felt when you would go to breathe freely?
A. I couldn't take a good long breath, seemed like it was cut off someway, I don't know how to explain it.

Q. Did you finally get up and dress, or were you dressed?

A. Imogene dressed me.

Q. And you remember when you arrived in Chicago?

A. Sometime in the afternoon.

Q. Do you remember how you were taken from the train?

A. Yes, some man taken me out of the train into a wheel chair and took me into the station where I was met by a railroad doctor.

Q. How were you taken off the train?

A. He picked me up in his arms and took me off the train to this wheel chair, this little fellow.

Q. And after he took you off the train, what means were used to convey you to the station?

A. He put me in a wheel chair.

Q. Well now, how were you feeling at this time?

A. Well, I just had a headache, my head throbbed, and my back hurt and my spine hurt, and below my hips hurt, and I was just in terrible pain.

Q. Do you know how long you remained in the La Salle street station at Chicago?

A. Just long enough—we only had time to go from one station to the other to take a train, and he questioned Jene——

Q. Who do you mean by he?

A. It was a New York Central doctor, I guess.

Mr. Marley: I object to the words, "New York Central Doctor, I guess.

The Court: The word "I guess" are stricken out.

Mr. Marley: And the New York Central Doctor, she identified him as that.

A. He said he was their doctor.

The Court: That will be stricken out.

Mr. Chilcott: Yes, that may be stricken out.

[fol. 281] By Mr. Chilcott:

Q. Was any examination made of you at the La Salle street station?

A. I don't remember.

Q. And then you were taken where?

A. They put me in a wheel chair, and then put me in a taxi cab, and they took me over to the station where I caught the train for home.

Q. Any examination made of you over there?

A. Yes.

Q. Do you know who made the examination?

A. Well, I know some doctor.

Q. How were you feeling, at that time?

A. Just the same.

Q. And then you boarded the train for Kansas City?

A. Yes.

Q. What train did you board, if you know?

A. No, I don't know.

Q. And do you remember ar-iving in Kansas City?

A. I do.

Q. How did you sleep that night?

A. I didn't sleep.

Q. And do you recall what time you arrived in Kansas City?

A. In the morning sometime.

Q. How were you removed from the train, if you remember?

A. I remember I was put in a wheel chair and carried up the steps of the Union station.

Q. And where were you taken to?

A. I was put in a car and taken to the Grace hospital.

Q. Whose car?

A. Doctor Marie Esmond.

Q. And how long did you remain in the Grace hospital.

A. Nine days.

Q. How did you feel while you were in the hospital?

A. Well, I just, they put me in bed and I just suffered with my back and——

Q. State whether or not you were able to talk while you were in the hospital?

A. No.

Q. State whether or not you were able to use your hand and foot?

A. I was not.

Q. You don't know what treatment was administered to you in the hospital?

A. All I know I had ice packs to my head and they wrapped this leg up in hot cloths.

Q. Now, did you feel of your head after this injury, after this bump you received?

Mr. Marley: You mean immediately afterwards?

By Mr. Chilcott:

Q. Any time afterwards up until the time she went to the hospital?

[fol. 282] A. I felt my head and had a raised place in the dressing room where she went to get our clothes, wash my face, and I had a bump there.

Q. Which side of the head?

A. On the left side of the head.

Q. Can you identify the place any better than saying the left side of the head?

A. I can show you.

Q. Let the record show it is just near the top of the head and a little to the front of the ear on the left hand side.

Mr. Marley: I think that is almost the top of the parietal bone.

The Court: Too much for me.

Mr. Marley: The jury has seen it, I guess it will be all right.

By Mr. Chilcott:

Q. Did you notice anything further in regard to this place where you got bumped on the head; you know whether there was any abrasion of the skin up there?

A. Yes, I picked the scab off myself at the Grace hospital.

Q. When?

A. Before I left the hospital.

Q. You don't know how long before?

A. No, sir; I don't.

Q. Where were you taken from the Grace Hospital?

A. To my home.

Q. Where is that?

A. 4025 Harrison.

Q. What means was used to convey you there?

A. A car.

Q. Whose car?

A. My car.

Q. Did you drive a car before you were injured?

A. Certainly did.

Q. How long had you driven a car?

A. About fourteen years.

Q. What was done with you after you were taken to your home?

A. Well, there wasn't anything only I just stayed in bed.

A. That is what I want to know. How long did you stay in bed?

A. I got up to go to the bath room and then I would go back to bed.

Q. How did you move about when you would get up to go to the bath room?

A. I would hold on to the things, or my mama and husband would help me.

Q. Do you know the condition your bowels were in when you were at the hospital in regard to being free or otherwise?

[fol. 283] A. I don't even remember them moving.

Q. How did you say you got to the bath room?

A. Mamma would help me and my husband would help me, and I would hold on to things.

Q. And how long did you remain in bed after you were taken home?

A. Well, I got up, my sister's wedding was the 13th of October, that was my first time up then, but I went back to bed.

Q. And how long did you remain in bed after that?

A. Well, I was up and down.

Q. Just about how long—you don't need to be exact, just the best recollection you have of it.

A. Until about November or December.

Q. And how did you feel during that period of time?

A. Well, I just cried, that is the way——

Q. State whether or not you had any pains or anything?

A. Yes, I had pains all the time in my head, I still have them, comes clear through to this side.

Q. And how did your back feel?

A. It still hurts.

Q. Well, how did it feel at that time, if you recall?

A. It has always hurt, ever since my accident.

Q. How did your arm and leg feel?

A. Numb and cold.

Q. State what ability you had to talk, whether you noticed any improvement or not?

A. Well, I talked better after I got out of the hospital, I can tell them over and over so that they would understand me.

Q. Now then, after you got up, you say you think you got up some time in November out of bed, that you didn't remain in bed all the time?

A. Well, I was up and down.

Q. After November?

A. After November.

Q. Now, how long was it until you ceased going to bed in the day time?

A. In December, sometime.

Q. You don't know about what time in December?

A. No, sir; I don't.

Q. And then where did you—then where would you be and how would you do after you quit going to bed in the day time, how long were you confined to the house; just about how long, you don't need to be exact.

A. Well, in January, I went down to the Ozarks, and I know I was up at that time.

Q. State whether or not you had been confined to the house up until that time?

A. Yes, sir.

Q. Whose place did you go to down in the Ozarks?

{fol. 284} A. Mrs. Francis B. McCarren's.

Q. Why did you go down there?

A. To get fresh air and get back to where I left off.

Q. How were you getting around?

A. Well, I did have—I would have to hold on to something.

Q. State how your speech was getting along at that time?

A. Well, I still had that numbness in my tongue that I had then.

Q. State how you were fed from the time you got hurt up to this period you are talking about now, until you went down to the Ozarks?

A. Well, somebody always cut my food up for me, and I fed myself with the left hand.

—. Were you right or left handed at the time of this injury?

A. Right handed.

Q. Now, how long did you remain down in the Ozarks?

A. About a week.

Q. How did you get around down there?

A. Well, I had a cane I walked with down there, because water and things were outdoors.

Q. And you came back here?

A. To 4025 Harrison.

Q. And how long did you remain at 4025 Harrison?

A. Until I moved out to the home I am at now.

Q. Now, how long did you continue to notice improvement in your condition?

A. I noticed an improvement for the first six months.

Q. First six months?

A. Yes.

Q. Now, I want you to tell the court and jury whether you have noticed any improvement since that time?

A. No, sir.

Q. I want you to tell the court and jury what attempts you have made to exercise your right foot and leg since you have been injured?

A. I have tried driving my own car, and I have tried to work in my shop.

Q. State what you have done, if anything, in regard to your house work?

A. I have tried to wash dishes, and I have tried to make beds.

Q. What happens when you try to wash dishes?

A. I break the dishes.

Q. Who did you house work prior to your injury?

A. Before I was injuries?

Q. Yes.

A. Well, I had a colored girl, she would come there and work half a day at the house, and I would come home and get my supper and get the rest of it.

[fol. 285] Q. Who has done your house work since?

A. I have had a maid.

Q. Now, when did you first start driving, attempting to drive your automobile?

A. About in March.

Q. Tell the jury how you drove it?

A. Well, I shifted gears with my left hand, and fed gas—I would drive a little ways, and my knee would get to shaking, and I would reach over and feed gas with my left foot, and shift with my left hand.

Q. Well, did you drive slow or fast?

A. I drove slow.

Q. Why did you use the car at all?

A. Because the doctor told me if I would——

Mr. Marley: Object to that.

The Court: Don't say what the doctor said.

A. Because I wanted to get my strength back.

Q. How much weight had you lost during this time?

A. Well, I weighed about 160 pounds when I was on the trip, and all I know is what I weigh now.

Q. What was the lowest that you weighed after the accident?

A. 118 pounds, I think.

Mr. Marley: She says all she knows is what she weighs now.

The Court: Well, she didn't mean that——

A. I weighed over in Doctor office and I weighed about 115 pounds.

Q. And how much did you weigh, or do you weigh now?

A. Well, I think I weigh about 130.

Q. About 130 pounds? I want to ask you, Mrs. Johnson, if you ever had any trouble with your eyes before this accident?

A. No, sir.

Q. Did you ever have any double vision before this accident?

A. No.

Q. What have you noticed in your ability to play the piano since you were injured—can you do it?

A. No, I can't do it?

Q. Tell the jury why you can't do it?

A. Well, I don't seem to find the keys.

Mr. Marley: How is that?

A. I don't seem to find the keys, I can't make my fingers work.

Q. Did you ever do any sewing before you were injured?

A. Yes.

[fol. 286] Q. State whether or not you are able to sew now?

A. I am not.

Q. Why can't you sew?

A. I can't make my fingers work.

Q. What kind of grip do you have in that right hand?

A. I haven't any grip in it.

Q. How does it feel now to you with regard to sensation?

A. I just haven't any sensation in it.

Q. Can you feel at all when something touches you on that hand?

A. I know they are touching it, and it doesn't, I couldn't tell it—you can touch this hand, and I can feel it.

Q. Which hand when you say this hand, are your referring to?

A. My left hand. I can feel the instant you touch it, but the right hand, if I didn't know you were touching it, I wouldn't know it, if I didn't see you.

Q. Well now, how about your leg. Tell what the sensation is when your leg is touched or your foot?

A. Well, it has the same feeling.

Q. What does that leg do when you attempt to walk, how does that leg feel, the foot when you attempt to walk?

A. When I raise it up, it feels like it wants to go up higher than I want it to, and when I first start to pick it up it drags, catches that toe on everything.

Q. What direction does the toe turn?

A. It turns in.

Q. Was your foot—did your toe turn in before you were injured.

A. No.

Q. I would like to have her walk, your Honor, back and forth?

The Court: All right.

Q. Just walk back and forth so that the jury can see you.

(Witness walks from the witness chair, and back again.)

Q. Now, Mrs. Johnson, I notice Mrs. Johnson, that the toe of your shoe is scuffed; tell what caused it?

A. My toe gets under me some way, it turns, I catch it and it goes this way at times. Sometimes the muscles draw up tighter than ever when I go to walk, and my toe kind of catches.

Q. You mean you have more difficulty walking sometimes than you do at others?

A. Yes, sir.

Q. State how you do when you are using that leg going up and down stairs?

A. Well, I always catch the toe.

[fol. 287] Q. You always catch the toe?

A. Yes.

Q. Where do you catch it?

A. I catch it on the step.

Q. Now, how does it act when you start down stairs; just state what you notice, if anything, in regard to it that you didn't have before you were injured?

A. I just can't walk like I did before, that is all.

Q. When you go up stairs, can you advance that right foot up the stairs?

A. No, sir.

Q. Did you dance before you were injured?

A. I certainly did.

Q. Are you able to dance now?

A. No.

Q. Did you cook before you were injured?

A. Yes.

Q. Are you able to do any cooking now?

A. I haven't done any cooking.

Q. Why don't you do cooking?

A. Well, I am afraid I will fool around the stove with only one hand—am afraid to fool around with only one hand is one of the reasons.

Q. Now, I want to ask you, Mrs. Johnson, the left side of your head there, how it feels to the touch, up there in the place where you got bumped?

A. Well, it is sensitive.

Q. What do you mean when you say sensitive?

A. Well, it hurts.

Q. Hurts when?

A. Whenever I touch it.

Q. Now, have you made any attempt to manipulate a permanent waving machine since you were injured?

A. No, I tried the mechanical curler, but I found out I couldn't use that on account of not having my right hand.

Q. State to what extent it is necessary to use your right hand in manipulating a permanent waving machine?

A. Well, I do all my wrapping with my right hand.

Q. What do you mean when you do the wrapping?

A. First you put the hair, take the hair off into one inch strands, and you take a string and wrap around that, and you put the curler on it, and then you take it and wind the hair around this curler, and put flannels on there, and put it up in the machine.

Q. Did you do that before you were injured?

A. Yes, sir.

Q. State whether or not you worked that hand rapidly or not?

A. Very rapidly.

Q. How many permanent waves were you able to do in a day?

A. On the average from fifteen or eighteen.

[fol. 288] Q. How many did you have to help you do that?

A. I did all the wrapping myself.

Q. When did you start your beauty shop?

A. I started my beauty shop the first of November, 1922.

Q. What was your income for the year 1924 from that beauty shop alone?

A. I think you have——

Q. Did you make this memorandum yourself at my request?

A. I did. This shows in 1924.

Mr. Marley: I object to that as incompetent, and the proper foundation not been laid for the introduction of it.

Mr. Chilcott: Did you make an income tax for the year 1924 and 1925 and 1926?

A. Yes, sir.

Q. And did you compute your taxes for those years?

A. I did.

Q. And make a return?

A. I did.

Q. And pay the taxes on the amounts you returned?

A. I have not?
Q. Have you wrapped a single curl?
A. No, sir.
Q. Since you got hurt?
A. No.
Q. How many days a week did you work?
A. Six days; I worked six days.
Q. Six days?
A. Yes, sir.
Q. What other work did you do besides permanent waving?
A. Well, I had a bath house, I used to give baths, and I used to do electrolisis.
Q. Anything else?
A. And hair dying and facials.
Q. Can you do any of that work now?
A. No, none of it now.
Q. How long were you away from your shop continuously after you were injured?
A. Ever since I have got hurt; I would go up there to see how things were going, and then go home.
Q. And have you been staying up there all day any time since you got hurt?
A. No, not all day.
Q. Now, I want to show by this witness that she paid, income tax for the year 1924, 1925 and 1926, have you any objection to what she paid income tax on?

Mr. Marley: That is objected to as incompetent.
The Court: Objection sustained.
Mr. Chilcott: Very well.

By Mr. Chilcott:

Q. Now, Mrs. Johnson, did you have any trouble with your nerves of any kind or character before you got hurt?
A. No, sir.
Q. How long had it been since you had a doctor to see you, treated by a doctor prior to your injury, before you were injured?
A. Well, I didn't receive treatment from any doctor.
Q. Were you sick or feeling badly in any way, shape or form prior to your injury?
A. No.

Mr. Chilcott: You may take the witness.

[fol. 291] Cross-examination.

By Mr. Marley:

Q. Now, Mrs. Johnson, I will just be as brief as I can. If you don't understand any question I ask you, why you ask me to explain, and take your time about answering. Just be perfectly easy about it, because there is no disposition on my part to trap you in any way.

Mr. Chilcott: I forgot to ask one question. May I ask it now?

Mr. Marley: Yes, sir.

By Mr. Chilcott:

Q. Mrs. Johnson, what was the amount of your doctor bills?

Mr. Marley: Just one point on that.

Mr. Chilcott: She paid her own doctor bills. She paid them herself.

By Mr. Chilcott:

Q. Is that right?

A. Yes, sir.

Q. Did you pay your own doctor bills?

A. I did, I have got them written down here.

The Court: All right, you can answer the question.

Mr. Marley: That is the point I was in doubt about.

Q. What was the amount?

A. $316.10, that is just a part of them.

Mr. Chilcott: That is all.

By Mr. Marley:

Q. Now, Mrs. Johnson, we will go back to New York City. You were there taking a post graduate course, handling the machines of the Nestles' Company?

A. Not this year.

Q. I mean the year 1925?

A. No, I took my post graduate course in 1924.

Q. In 1924?

A. Yes.

Q. And there was a law passed in Missouri in 1925, requiring you to pass an examination before a commission, wasn't there, didn't you have that in mind when you went there?

A. This last time?

Q. When you went there the time you were hurt?

A. No, sir.

Q. While you were there at the Nestles place, were you attending a series of lectures or anything of that kind?

A. Well, I had discussed the matter with Mr. Nestles, but it was over the testometer.

[fol. 292] Q. You had no special purpose of going there to learn anything?

A. Oh, I was going there to learn the new machine and try and get the first testometer that was in Kansas City.

Q. You wanted to beat somebody to it?

A. No, I wanted the privilege of having the first one.

Q. While you were in New York, did you have any dizzy spells at all?

A. No.

Q. You never did?

A. No, sir.

Q. Did you ever at any time have any dizzy spells?

A. No.

Q. Now, you and Imogene got on the train there at Harmon that evening, coming home, this particular occasion, September 27th, you and Imogene got on the train at Harmon, as I understand you to say. Is that right?

A. Yes, Harmon.

Q. Now, when you got on the train at Harmon, I believe you put your grips in the berth?

A. When I carried the grips——

Q. I don't think there is much issue on that. I think Imogene's version is that you did put them in the berth as preliminary to washing to go to supper. Is that your recollection of it?

A. My recollection is the train man took our grips when we were going in the train, and took the grips back to the berth himself.

Q. That is your recollection of it?
A. Yes, sir.
Q. That was lower 8 car 64 on that train wasn't it?
A. It was.
Q. After you had had your grips put in number 8 then you went to the wash room and washed.
A. Yes, and fixed up.
Q. And fixed up. Do you remember about how long you were in there getting ready for your supper?
A. No, I don't.
Q. You couldn't tell.
A. Just washed and powdered.
Q. Was it as much as half an hour, or an hour?
A. Just as long as it would take to wash and powder.
Q. The usual time taken by ladies in fixing up, is that it?
A. Yes.

The Court: That is quite some time.
Mr. Marley: The married men will take judicial notice, I suppose.

Q. Now, then, after you fixed up you went into the dining car and ate dinner?
A. Yes, we did.
Q. That car was at the rear end of the train, wasn't it?
[fol. 293] A. I don't know whether it was the rear end or not; several cars back.
Q. Back of your sleeper, wasn't it?
A. Yes, sir.
Q. And I believe you ate a good hearty dinner there?
A. I sure did. Was hungry.
Q. And after you ate your dinner you then went to the club car, didn't you?
A. Well, we looked around for an observation car first.
Q. To do that you had to go to the back end, didn't you?
A. No, we asked the conductor or someone on there if there was an observation car, and I believe they told us there was not.
Q. So then you went to the club car?
A. Yes.
Q. The club car was ahead of your car, wasn't it?
A. Yes.
Q. Do you know how many cars ahead?

A. No, I don't. I know it was several.

Q. Now, these sleepers were all the regular sleepers you usually ride in; you didn't see any difference between those sleepers, in other words, and any other sleeper in the train, did you?

A. I didn't observe that.

Q. They all looked alike to you, didn't they?

A. Well, I didn't examine them.

Q. I know, I admit that. I am merely asking how it appeared to you. As you went through the train, how did one car look to you, as any other car that you observed? In other words, to make it simple, did you observe any difference in the cars?

A. I never noticed any difference.

Q. That is what I am getting at. Now, then, when you would go from one car to another you would pass through a vestibule, would you not?

A. Yes.

Q. And those vestibules were all closed?

A. Yes.

Q. And you could step right from one platform of a car over to the platform of the other car, couldn't you?

(No answer.)

Q. Well, you did didn't you? You had to go from one car into the other car.

A. Yes, had to go from one car to the other.

Q. And you found the cars right close together, the platforms, like that, didn't you?

A. Yes.

Q. In every car?

A. Yes.

Q. Now, when you went to the club car about what time was it when you got there?

A. I don't know.

Q. Well, about? You understand, now, don't think, you know, that I want it to the hour or the minute, but just approximately so we can get the general idea.

[fol. 294] A. Well, I don't remember what time it was.

Q. You don't remember. Well, now, when you went into the club car were there many people there in the car?

A. I don't remember that.

Q. You don't remember that. Well, when you and Imogene went in there did you sit down by a table or anything?

A. There was a little table or something to play cards on in the seats that we set down by.

Q. Now, were these club cars—you know some of them—I will ask you this: Were they cars that had little places with a table in where people could sit on one side of the table and some on the other side, facing each other?

A. Yes, sir.

Q. That was the kind of a club car this was?

A. Yes, sir.

Q. Now, when you went in there did you and Imogene take one of these little places and sit down by the table?

A. Yes, sir.

Q. Did you sit on the same side of the table, or on opposite sides?

A. No, we sat opposite one another.

Q. Then I believe from what she said you commenced playing rummy.

A. Yes, sir.

Q. Well, did you play alone that evening; that day?

A. No, there was a gentleman that joined us.

Q. A gentleman joined you?

A. Yes.

Q. Was there just one gentleman joined you, or two?

A. Just one.

Q. Didn't you have another one playing with you at all that day?

A. No.

Q. Just the three of you?

A. Just the three of us.

Q. Now, you don't smoke, do you?

A. No.

Q. And wasn't there a good deal of tobacco smoke in that car that evening?

A. I don't remember that.

Q. You don't remember that?

A. No.

Q. Wasn't there so much tobacco smoke in the car that you noticed it and that it affected you?

A. No, sir.

Q. You did not. Now, did that gentleman commence playing with you just as soon as you went in, or after you and Imogene had played together for a while?

A. Well, I don't remember.

Q. You don't remember?

A. I know he didn't go up there with us.

Q. How is that?

[fol. 295] A. I know he didn't go up there with us. We had been playing, I guess, a few minutes before he sat down there.

Q. Now, then, did he smoke while he was playing with you?

A. He did. I think he did.

Q. Was he smoking cigarettes or tobacco?

A. Cigarettes.

Q. Was he sitting facing you or by your side?

A. By my side.

Q. By your side?

A. Yes.

Q. Didn't he continuously smoke cigarettes there while you were there playing with him that evening?

A. No.

Q. Do you remember about how much of the time he was smoking cigarettes?

A. No, I don't.

Q. Did he play there with you and Imogene until you got ready to go to bed?

(No answer.)

Q. What is your best recollection about that?

A. I don't really remember.

Q. You don't remember. Now, then, about what time was it you left the club, if you recall?

A. Well, it was between eleven and twelve o'clock.

Q. Eleven and twelve. Now, when you left the club car I believe you then went to your berth, lower 8 in car 64 of that train 19.

A. Yes.

Q. Now, the club car, I believe, was ahead of your car.

A. Yes.

Q. So that when you—you went back towards the rear of the train to get to your car; sleeper.

A. Yes.

Q. In other words, you went towards the rear.

A. Yes.

Q. Now, when you got to the car, your berth, you were still facing the east, or the rear of the train?

A. You mean as I walked back?

Q. Yes. In other words, you went on back, and as you walked back you were by your berth but you were looking towards the rear of the train, weren't you?

A. No, I was looking towards—I turned around and faced Imogene.

Q. Faced Imogene?

A. Yes.

Q. Well, now, when you started back to your berth from the club car, which was in front; you or Imogene.

A. I took the lead out of the car.

Q. You took the lead out of the car.

A. Because I was sitting closer to the door.

[fol. 296] Q. Now, then, you went on down until you got to your berth. Well, then did you go from the head of the berth towards the foot of your berth?

A. I did.

Q. And you went down towards the foot of the berth?

A. I did.

Q. Then you turned around and faced the front of the train, did you?

A. No. By that time Imogene had took the suit case out from underneath the berth.

Q. I know, but she was behind you, don't you see?

A. I know.

Q. So that you had passed beyond, as it were, beyond the middle of your berth, and had gotten toward the foot of your berth, hadn't you?

A. Yes. Then I turned around.

Q. And she was back of you, wasn't she?

(No answer.)

Q. She was behind you when you stopped at your berth?

A. Yes.

Q. Now, as I understand, you then turned around to face her, and that made you face the front of the train, didn't it?

A. Yes.

Q. Now, when you faced the front of the train your left side, left hand, was next to your berth, wasn't it?

A. No.

Q. After you turned? Now, when you turned and looked towards Imogene wasn't—and you were-'t looking east—was your lower 8 on the right hand side of the car or the left hand?

Mr. Wickersham: Now, just a minute. Your honor, the witness hasn't testified she was looking east at the time. She was looking toward the engine. She was looking west.

Mr. Marley: Wait a minute. I am cross-examining the witness.

Mr. Wickersham: I submit he is stating in his question, assuming that the witness has so testified when she has not.

Mr. Marley: Wait a minute. I object to that, your honor. I am cross-examining.

The Court: Objection sustained.

By Mr. Marley:

Q. Now, if you don't understand any question I ask you, Mrs. Johnson, you just say so; I want you to just tell it to [fol. 297] me straight, and I don't want to ask you a question that will confuse you in anything. If I do confuse you, why, you let me know, because I don't want to have you confused in any way.

The Court: Permit the cross-examination to proceed without unnecessary interruption.

By Mr. Marley:

Q. Now, the train was going west, wasn't it?

A. It was.

Q. Now, to get it straight in your mind, now, when you went you went into the car, and the train was going west, was lower 8 on your left hand side as you went into the car?

A. 8 on my left hand side; yes.

Q. It was on your left hand. Some times they switch those cars the other way and you can't tell. Now, then, as you went in lower 8 was on your left hand side, that is correct. I see what you had in mind.

A. Yes.

Q. Now, then, as you came back from the club car, lower 8 was on your right hand side, wasn't it?

Mr. Chilcott: I object to that question, because it hasn't been shown where she was coming from when she came into the car, or when.

Mr. Marley: I said when she was coming back from the club car.

The Court: Yes, I think the question is perfectly fair. Overruled.

Mr. Marley: I want to be fair. I don't want them to think I am trying to be otherwise.

Q. Now, then, as you came back from the club car, which was ahead of your car, and came back to your lower 8, your berth was on your right hand side, wasn't it?

A. On the left hand side as I was coming back from the club car.

Q. The club car, I believe, was ahead of your car, wasn't it?

A. Yes.

Q. Now let's start again, because I think you have said, and I think you are right in the first place from what you said in the beginning, when you went forward to get to your berth after you got on the train and put your satchels in the berth, the berth was on your left hand side, wasn't it? [fol. 298] A. When I went in the car? You mean when I put the grips in the car?

Q. Yes, when you first got on the car?

A. Yes.

Q. As you come in, you come in from the rear end, didn't you, of the train?

A. Yes, I did.

Q. You generally get in the sleeper at the rear, don't you?

A. I did that night.

Q. You did that night. Now, as you come into the sleeper where was lower 8; on your left hand side, wasn't it?

A. It was.

Q. And you put the grips in like that, didn't you?

A. The porter did.

Q. The train man did.

A. Yes.

Q. Then you went on in the wash room, washed and fixed up, and then came back.

By the Court:

Q. Mrs. Johnson, was the berth on the south side of the train as you were going west, or on the north side? The train was going west. Was it on the south side or north side?

A. Well, I faced the west. Then my berth was right along here.

By Mr. Marley:

Q. Then it would be on the right side of the car. You see, I want to get you straight on that now, Mrs. Johnson. We can take the time, with the permission of the court, to get straight on that. Now, just be slow about it and let's take it easy. When you go in on the rear end of the train you started forward and followed the man with the grips. Now, when he put the grips in the berth, did he put them in a berth on the left or right side?

A. On the left side. I went in on the left side.

Q. You went in on the left side, yes. Now that you are going west, that would be the south side of the car, wouldn't it?

A. Yes.

Q. Now, then, we have got that point to start with. Now, the club car being forward, you came back and walked east to get to your berth, didn't you, lower 8, which was on the south side of the train?

A. Walked to the back of the car.

Q. Yes, after you left the club car, ready to go to bed, now—forget everything else—you left the club car, ready to go to bed, you were then fronting east, and your lower 8 was on your right hand side, wasn't it? (No answer.)

Q. Don't you see, my lady? It had to be on the right hand side as you came back, because it was on your left hand side as you went forward.

[fol. 229] Mr. Wickersham: I object to counsel arguing with the witness.

Mr. Marley: I am not trying to argue with the witness, your honor. I am trying to make it clear to the witness. I see she doesn't quite comprehend my question, and I don't want her confused about it, and I don't think your

honor will hold I am in any way undertaking to mislead the witness.

The Court: Let's get it clear, Mrs. Johnson, if you know.

A. Well, I can remember if he will tell me by the way the engine goes and by the back of the train; I can remember that.

By Mr. Marley:

Q. Well, now, we will get it that way, then. The engine, of course, was going west, wasn't it?

A. Yes.

Q. And when you got on the rear of the sleeper you walked towards the engine, didn't you?

A. When I got on the sleeper?

Q. When you got on the train the first time, you walked towards the engine, didn't you?

A. Yes.

Q. Now, when you walked toward the engine your berth, lower 8, was on the left hand side, wasn't it?

A. It is all according to the way I was going.

Q. What?

A. It is all according to the way I was going.

Q. Well, I understand, but you are going now towards the engine. I am trying to get the engine as your basis of calculation.

A. Yes; on the right side.

Q. What?

A. On the right side.

Q. Then as you went towards the engine the berth was on your right side, is that it?

A. Yes.

Q. When you first got on the train?

A. As I first got on the train, yes.

Q. Yes. Don't mix up on the question.

A. No, it is on the left side.

Q. On the left side. That is what I am getting at. So when you were going towards the engine your berth was on your left side, wasn't it?

A. Yes.

Q. Now bear that in mind. I would just as soon we got a little piece of paper here; she could just show that way. Now, then, you went forward to the club car, and when you got ready to come back you left to come back towards the rear of the train, leaving the engine at your back?

A. Yes.

Q. Now, when you left the engine at your back and came forward, then your lower 8 was on your right hand side, wasn't it?

(No answer.)

[fol. 300] Q. Take your time, now; there is no hurry.

A. Let's see. Ask me that question again.

Mr. Marley: Read it to her, Mr. Bond.

(Question read as above recorded.)

A. Yes.

Q. Now, you were ahead, I believe, of Imogene?

A. Yes.

Q. And you went on down towards the foot of your berth?

A. Yes.

Q. Then, as I understand you, you turned around and faced Imogene, who had been behind you at that time?

A. Yes.

Q. Now, when you faced Imogene did you face her looking right straight down the aisle of Pullman, or looking at an angle toward your berth?

A. At an angle towards my berth.

Q. Now, facing—of course, when you turned around and faced Imogene that then put your lower 8 to your left hand side, didn't it?

(No answer.)

Q. You say you just reversed your position, and you were in the same position as you were when you first entered the car; isn't that right?

A. No.

Q. Take your time, now; no hurry about it.

A. I know I was standing there with my right hand—I was standing by my berth with my right hand on the curtain.

Q. Well, now, wait a minute. Your right hand—that is what I am getting at. You were facing Imogene with your berth on your left hand side, wasn't it?

A. The berth was on my right side.

Q. Well, after you turned to face Imogene. As I understand your testimony, your berth was on the right side as you come from the car, and passed towards the foot of the berth. That is, now for instance, here it is on the right like this; then you turn like this; that put your berth on the left, didn't it?

(No answer.)

Q. Didn't it?

A. You mean as I was walking back?

Q. Now, just watch me a moment. Now, for instance, you are coming back from the club car, and Imogene was behind you; you walked like this and got to the foot of your berth, then you turned like this to face Imogene—supposing Mr. Wickersham is Imogene—at the other end of the berth, or the middle of the berth. Now, that put your berth to your left hand side, didn't it?

A. No, my right side.

Q. After you turned around? You see, now, I think you are a little confused there. You understand the berth, as [fol. 301] you came back, was on your right hand side. Now note me again, now, so we will not get mixed up. Here was your berth, as you say, when you came in from the club car, on your right hand side; and Mr. Chilcott there represents the rear end of your berth. Now, you came to the right, and as you come down here Imogene was behind you; you turned around to face Imogene, didn't you?

(No answer.)

Q. Didn't you?

A. The berth was at my right as I was going up to the engine.

Q. To your right going up to the engine.

A. On the right side of the car. It was on the south of the car.

Q. Well, no, the train was going west; you understand?

A. Yes.

Q. And if it was on the south side and you got on the rear end of the car, Mrs. Johnson, your berth had to be on the left hand side.

Mr. Wickersham: That is objected to as argumentative.

The Court: Overruled. Mr. Marley, let me suggest you

take this tablet and draw a picture large enough for the jury to see it and have her show it.

Mr. Marley: All right, I will be glad to do that. I think that it is fair to both sides.

Q. You wouldn't know what number of sections was in this car, would you?

The Court: It don't make any difference about that.

Mr. Marley: Well, I know. We will just indicate the one.

Q. Now, Mrs. Johnson, I will put this up here by you.

A. Yes.

Q. I have marked this as the engine up here; this is your sleeping car. Now, this is your sleeping car right here, and this is up towards the engine. This is the rear of the car. Now, you got on, as I understand you, you got on the rear of the car, say here are the steps.

A. Yes.

Q. You went up and and got into it and started up the aisle; of course on one side. I have made this go down there in the center.

A. This is the aisle.

Q. This is the aisle, yes. Now, where was your lower 8? Starting in here at the rear of the train, where was your lower 8?

A. Just about some place in here.

[fol. 302] Q. All right, we will mark that "lower 8," like that. Now, you came in, you say, like this, and there is the way you walked, and you put your grips right in here, didn't you?

A. Yes.

Q. Now, then, after it all, you went up forward to the club car, didn't you?

A. Yes.

Q. All right. That was towards the engine, wasn't it?

A. Yes.

Q. Now, when you came back you preceded Imogene, didn't you? That is, you were ahead of her?

A. Yes, I was ahead of her.

Q. Now, when you got back down here Imogene was behind you, and you got right towards the rear of your berth,

didn't you, this "8" right here? I am marking "8" right there.

A. I stopped here and Imogene come around here and got her grips.

Q. Oh, you stopped at the front end of your berth. Now, you say where you stopped.

A. No, I come here and I stopped here.

Q. That is what I thought.

A. This is the rear of the train.

Q. Rear of your berth, wasn't it?

A. Yes.

Q. Now, here is where you stopped?

A. Yes.

Q. Now, when you stopped there, Imogene—where did she stop?

A. She stopped right here and got the suitcases.

Q. We will mark that "I" for Imogene, see? Now, then, when you turned there, then your berth was on your left hand side, wasn't it? I will just switch it so you can see; like that. That left your berth on your left hand side, didn't it? Like that, didn't it?

(No answer.)

Q. Here is your front of your engine up here.

A. Yes.

Q. Now, then, you turned, and then you had the berth on your left hand side, didn't you?

(No answer.)

Q. Here is the engine here, here is Imogene here, and there is where you stopped and you faced Imogene. Now, when you faced Imogene you had your left hand next to your berth, didn't you?

A. That must not have been the way, because I had my right hand on the berth.

Q. You had your right hand on your berth, 8?

A. Yes, sir.

Q. You had your right hand on your berth?

A. Yes, sir. My brain just isn't clear enough. I know I had my right hand on that curtain.

[fol. 303] Q. That is what I am getting at, whether it was the curtain of the berth that you and Imogene were to occupy or was it the berth, that was on the other side of the aisle?

A. No, it was my berth.

Q. It was your berth?

A. Yes.

Q. And you had the right hand, your right hand, on the berth?

A. On the curtain at the foot of my berth.

Q. On the curtain at the foot of your berth.

A. Yes.

Q. And were you at the same time facing the engine?

A. Yes, I was facing the engine when I had my hand on the curtain.

Q. Now, when you had your right hand on your curtain of your berth, did you have your right hand across your body like this, to hold onto it (illustrating)?

A. No, I didn't.

Q. Then when you took hold of the curtain of your berth your right hand and shoulder were next to that curtain?

A. Not my shoulder.

Q. Well, right hand, say.

A. Just my right hand.

Q. Now, when you had your right hand on your curtain, your arm didn't cross your body like that?

A. No.

Q. Then you never had it in this position, isn't that right.

A. Yes.

Q. So that you then were standing at the rear end of your berth, lower 8, with your right hand holding onto the curtain at the rear end of your berth?

A. Just against that board.

Q. I know, but it is still your right hand?

A. Yes.

Q. And of course there is a board that slips in there between the berths. Now, you had your right hand holding those curtains right next to the foot board of your berth?

A. Well, I don't know whether it was just there or not, but I was steadying it against that partition.

Q. Well, there is a board—

A. There is a foot board or a partition, whatever it is.

Q. Yes, they slip a board in at night when they make down a berth; they pull the lower down like that and fasten it, then they slip a board in between.

A. Yes.

Q. Now, then, that board was slipped in, of course, and you were standing at the foot of your berth 8, with your right hand holding the curtain of your berth 8 next to this board or partition, we will call it. I think you may understand it better. And yet your right hand wasn't crossing your body like this?

A. No, sir.

Q. It was right like that?

A. Yes, sir.

[fol. 304] Q. Now, then, while you were holding the curtain with your right hand, just as you have stated, how were your feet? Can you recall how they were?

A. Well, I know that I was standing by there and I had just sort of this position (illustrating).

Q. Now, then, when that came on, in that position, I understand you to say there was a sudden check of the movement of the car, is that it?

A. Sudden lurch, as though it stopped.

Q. Well, now, in order to get that straight, a lurch is a side motion, like that. It wasn't a side motion, was it?

A. It was a lurch and a jerk and a jolt.

Q. It was a lurch and a jerk and a jolt?

A. As though the train stopped.

Q. As though the train had actually stopped?

A. As though it stopped.

Q. What?

A. Just as though it stopped and went on.

Q. Well, you mean as though it had not stopped, but just checked its motion, don't you? The train was going about—it was going the usual speed, wasn't it? You didn't notice that it [slowered] down at all, did you?

A. Well, maybe you would call it that. The train slowed down suddenly.

Q. But it went on suddenly, didn't it?

A. Yes, sir, I don't know they put on——

Q. Well, it checked suddenly?

A. —or what they run over, or——

Q. Now, then, when they did that, did you still hold onto the curtain?

A. I still held the curtain and swung around.

Q. Well, I understand. Now, then, you had the curtain with your right hand?

A. Yes, sir.

Q. And you still held it and as you swung around and you continued to hold it, didn't you?

A. Yes, I continued to hold it until I struck my head.

Q. And you kept on holding it. Did your arm go around this way, like that (illustrating)?

A. No.

Q. It didn't?

A. My body went around.

Q. Your body went around?

A. Yes.

Q. Did the curtains give at all?

A. Well, I don't remember.

Q. You don't remember whether they gave at all or not?

A. No.

Q. But your body swung around this way with you holding onto that curtain, is that correct?

A. Yes, my body swung around and the train threw it around.

[fol. 305] Q. I understand, but your body swung around; that is what I am getting at.

A. The train threw me around.

Q. Well, I understand.

A. The jerk, the jolt; whatever it was.

Q. That is what I am getting at. The point is there was a checking of the motion of the train?

A. Yes, sir.

Q. And it took you by surprise, didn't it?

A. Well, that sudden jerk did.

Q. You weren't expecting any checking of the motion of the car at all, were you?

A. Yes, because I was holding it. I was protecting myself, or bracing myself.

Q. You had hold of the curtain, but you weren't expecting any slowing down of the speed of the train, were you?

A. Well, I wasn't looking for that particular jolt.

Q. What?

A. I wasn't looking for that particular jolt.

Q. I know.

A. But I was standing there steadying myself prepared for——

Q. Were you anticipating a jolt of that kind, or weren't you holding there steadying yourself against the swaying of the train as it rolled back and forth on the trucks? Wasn't that the reason you had hold of that curtain?

A. Just had hold of the curtain to steady myself.

Q. Yes. You know, Mrs. Johnson, that ordinarily, standing in the aisle of a car, there is always a rolling of the coaches, isn't there?

A. Yes, sir.

Q. Back and forth.

A. Yes, sir.

Q. It doesn't go smooth, but just rolling like that?

A. Yes.

Q. Now, then, you had taken hold of this curtain in this position to kind of steady yourself against that rolling motion; wasn't that right?

A. Yes.

Q. And that is what you had in mind when you took hold of the curtain, wasn't it?

A. Yes, to steady myself.

Q. Now, then, unexpectedly to you, the speed of the train checked, isn't that right?

A. As though it stopped.

Q. Well, it checked; of course, if it kept on checking it would finally stop, but it checked?

A. Yes.

Q. Now, then when it checked I understand you to say you still held the curtain and swung around?

Mr. Wickersham: Just a minute, your honor. That movement of counsel by moving around to the back there as- [fol. 306] sumes that the witness has so testified. The witness hasn't testified anything of the kind. She says she was thrown forward and around.

Mr. Marley: I believe, your honor, that it is proper cross examination.

Mr. Wickersham: I don't think it is.

Mr. Marley: If your honor thinks it is not, why, all well and good. I am trying to get the motion of the plaintiff's body with her hand, right hand, on that curtain to the rear end of that berth 8.

The Court: The objection is overruled.

Mr. Marley: Now read the question, please.

(Question read as above recorded.)

Q. I understood you to say your body swung around but your arm didn't; isn't that right?

A. No, when this terrible lurch came I had hold of the curtain, and it threw my whole body forward, and then threw it up against the berth; and——

Q. Well, now, that is the point; it threw it up against the berth. What berth did it throw it up against, Mrs. Johnston? Against your berth, or the berth across the aisle?

A. Threw it up over my berth.

Q. Threw it up over your berth. In other words, what I am getting at is, holding the curtain here, now, with your right hand, this sudden jerk of stopping threw you around so that your left temple struck——

A. Not my temple; it hit me right here.

Q. Well, the left side of your head.

A. Yes.

Q. I am just asking in a general way. Went clear around and made you hit this way. Now, wasn't that lurch forward? Wasn't that lurch or jerk of the car such as to throw you forward down the aisle?

A. No, it threw me around.

Q. Well, now you say it threw you around. Was that throwing around caused by your holding onto the curtain, or was it caused by the jerk of the car? (No answer.)

Q. If you recall; what is your best recollection?

A. I had hold of the curtain.

Q. Yes.

A. And I pivoted around, I guess you would say. I went around this way; just kind of threw me forward and around up there and threw my head against that lower part of the upper berth.

[fol. 307] Q. Now, that is all you know about it, is it? That is your best recollection?

A. Well, then it threw me to the floor.

Q. Wait a moment. I will go on to that in just a minute. I want each one at a time. That is your best recollection up to that time?

A. Yes.

Q. Now, when you turned around, wasn't the tendency of the motion to throw you right straight down the aisle; pitch you down the aisle, if the car stopped suddenly?

A. No, it threw me up against the berth.

Q. What?

A. No, it didn't throw me down the aisle.

Q. Didn't you feel the impetus to carry you down the aisle when that car stopped suddenly?

A. Suddenly, but then, I just had long enough to hit my head and then as though it started again and threw me to the floor.

Q. Well, do I understand you to say that you undertook—that you hit your head against that upper berth before your body had pitched forward towards the front of the train?

A. Say that again.

Mr. Marley: Read that to her.

(Question read as above recorded.)

A. Why, it threw me forward and swung me at the same time—it just kind of threw me forward and then all around until my head hit the sharp edge of the lower—upper berth.

Q. Now, did you notice that edge of that upper berth was sharp?

A. Well, I could sure feel it.

Q. I know, but you said it was sharp. Did you ever see a sharp edge to an upper berth?

A. Well, it wasn't like a knife, I know.

Q. What?

A. It wasn't like a knife, I know, but it felt like it.

Q. I know, but then, when you say—you are just speaking of the feeling, is that right; you are just speaking of the sensation that you experienced, is that it?

A. Yes.

Q. All right. Now, any sensation of a blow is sharp, isn't it; has a keen pain?

A. That is the first one I ever had.

Q. Then that is all you know about it, because this was the first you ever had. Now, then, let's go a little further. You fell to the floor, did you?

A. It threw me to the floor.

Q. I know it threw you to the floor. Now, you went into the ladies' dressing room and washed your head, did you, or washed your face?

A. Not right then.

Q. Did you put your hand up there then to feel where this was?

[fol. 308] A. Well, I sat there on the floor. Everything was black and I was sick.

Q. I am beyond that now. What I am talking about is you got up and went to the wash room to wash your face.

A. I didn't get up. Imogene helped me—I suppose.

Q. I know, but you got to the wash room to wash your face, didn't you?

A. Imogene washed it.

Q. I know, but you got up for that purpose. I don't care who did it, just as long as you got to the wash room for that purpose.

A. Yes.

Q. Now, when you got to the wash room for that purpose you put your hand up to this place, did you?

A. I showed Imogene where I was hurt.

Q. I know, but you put your hand up there, too, didn't you?

A. Yes.

Q. When you put your hand up there how big a lump did there appear to be?

A. I don't know how big it was.

Q. Did it feel to you to be as big as a hen egg?

A. I don't remember. All I know is I had a bump on there.

Q. All right. Did it feel to you to be half as big as a hen egg? I would like to get an idea of the size of the bump now, Mrs. Johnson, that is all.

A. I couldn't tell you just how big it was.

Q. Was there any blood? Could you see any blood when you put your hand there?

A. No, I didn't see any blood when I put my hand up there. I couldn't see it.

Q. Well, when you brought your hand back did you see any blood on it? Did you feel any blood?

A. I never noticed it.

Q. You never noticed it?

A. No.

Q. Now, you got to Chicago, you say, the next day, in the afternoon.

A. Yes.

Q. And when you got —then you had a doctor examine you at the LaSalle street station, I believe.

A. I don't remember him examining me.

Q. Well, what I mean—I didn't mean examine your whole body, but just examine your head, you know. Did he examine your head?

A. I don't remember him doing that.

Q. What do you remember him doing, then?

A. Nothing.

Q. What?

A. Nothing.

Q. Didn't he look at your head at all?

A. I don't remember him looking at my head.

[fol. 309] Q. Then you came on to Kansas City and went to the Grace hospital?

A. Yes.

Q. Now, you were in there, I believe, from September 29 to October 9, 1925.

A. I know I was in nine days.

Q. Well, I believe that is what the record shows, that is all. Now, you don't remember what treatment they gave you or what medicines, do you?

A. No, I don't.

Q. You don't?

A. All I know is I had an ice cap to my head.

Q. I know, but—I believe you say you had a hot cloth to your right leg, fore leg.

A. Yes.

Q. Now, you didn't know for what reason they put that hot cloth on your fore leg, did you? I mean your right leg.

A. Yes, because it was cold. They tried to get it warm. It was cold.

Q. It was to restore the circulation, wasn't it; stimulate it?

A. They was trying to.

Q. Now, after you left the hospital on October 9, I believe you went home?

A. Yes.

Q. And you were in bed for several weeks?

A. Yes.

Q. Now, did Dr. Sanders attend you while you were in bed there after you left the hospital?

A. No.

Q. Did Dr. Sanders ever attend you at any time after you left the hospital October 9, 1925?

A. I don't believe he did.

Q. Now, then, after you went—when you were home there sick abed did you have any doctor at all?

A. I don't—let me see. You asked me if I had any doctor at all after I left the hospital?

Q. Listen to me, so as to make it clear. Don't mix it up with anything else I ask. You were home there in bed for several weeks, I believe; is that right?

A. Yes.

Q. Now, while you were there, Mrs. Johnson, did you have any doctor waiting on you?

A. No.

Q. You didn't?

A. No.

Q. Can you recall about when it was that you first got up? That is, what month of the year when you first got up out of bed at any time?

(No answer.)

Q. Wasn't it in November?

A. I think it was—15th of October.

Q. How is that?

A. I believe I got up—the first time I got up was my sister's wedding; was the 15th of October.

Q. Well, what I am getting at is, I don't mean for any particular thing, but when you got up out of your bed as [fol. 310] having abandoned your bed as a place for you for sickness. In other words, you got up out of your bed finally.

A. Not to stay.

Q. What?

A. Not to stay, though.

Q. Well, have you ever gotten up out bed to stay? I mean so as to be around like ordinary people?

A. Well, I won't stay in the bed any more than I can help.

Q. I know, I understand that, but what I am trying to get at is about when did you leave your bed as though you were not bedridden any more? Can you give me about what date that was?

A. Well, I don't believe I could give you the date.

Q. All right. Now, after you got up what doctor was the next doctor that you employed?

A. I believe Dr. Gerraughty was the next one.

Q. Doctor what?

A. Let's see.

Q. I think you are wrong on that, so I will try to call your attention to it. Didn't you have a doctor——

A. Dr. Woody.

Q. Woody?

A. Yes.

Q. You had a Dr. Woody, didn't you?

A. Yes.

Q. Now, Dr. Woody commenced treating you on November 21, 1925, didn't he? Isn't that about the time?

A. Well, I would have to look at his papers to see.

Q. Have you got his bill there?

A. I think I have.

Q. Well, would you mind letting me look at it a minute? We may be able to fix the date right there.

A. Here it is.

Q. Here we are, right there.

A. December. December 14, I took the first treatment.

Q. I will just hold this a minute, then I will bring it back to you. Didn't he treat you about three times a week?

A. Well, it shows on there. I don't recall.

Q. Yes, I know. The point is that I have a memo here that he treated you on November 21, 25 and 30. You remember that? It doesn't seem to be on his bill here. Did you see him for any other treatments?

A. December, I think, was the first time I went to him.

Q. Well, then, Mr. Worth W. Woody is the man that treated you next after you left the hospital?

A. Yes.

Q. And this shows the dates of his treatment?

A. Yes.

Q. Now, will you just look at that memo and give the jury the dates of the treatments as shown by that?

A. December 14 and 18.

Q. 1925?

[fol. 311] A. 1925; and then January, '26; 2, 4, 6, 8, 11, 13 and 15, 18, 20, 23, 25, 27.

Q. February?
A. February 1, 5, 8, 12, 27.
Q. Now, he attended you on those days, didn't he?
A. Yes.
Q. Did you go to his place, or did he come to your house?
A. No, I went to his office. My husband took me up there in a car.
Q. Now, then, do you know what treatment he gave you?
A. He just treated my spine and my shoulder.
Q. Did he give you any hypodermic injections?
A. No, he didn't.
Q. He never did?
A. No.
Q. Did he give you any medicines to take internally?
A. No.
Q. All he did, then, was just to rub you, as it were?
A. He is a chiropractor.
Q. Chiropractor; but he didn't do anything else?
A. No.
Q. Now, you left him, then, after the 12th of February, 1926, and went to Dr. Gerraughty, didn't you?
A. I don't remember the date.
Q. He is in the Shukert building, I think, in this city.
A. Yes.

The Court: She said she didn't remember the date.
Mr. Marley: Oh.

Q. Now, then, how long did you go to Dr. Gerraughty for treatment?
A. Only a few times.
Q. Now, what treatment did he give you?
A. Well, he gave me some kind of a serum.
Q. Serum. Injected it into the arm, didn't he?
A. In the muscle of my arm.
Q. And did he tell you what it was?
A. No, he just told me that he knew he could do me a lot of good.
Q. Didn't he call it salvarsan?
A. No.
Q. He didn't?
A. No.
Q. Didn't he tell you that it was an arsenical treatment?

A. No.

Q. Now, while he was treating you and giving you this serum, you broke out with what you called the hives, didn't you?

A. Well, I went to his office one day and I was crying, telling him that I couldn't stand it any more, that it was too severe, and just crying and begging him to not give me [fol. 312] any more, let me rest a while; then I went home; then I called him up the next morning, and I says, "Doctor," I says, "I have broken out, my face and my hand, arms," and I swelled all up, and he says, "Well, you had better come down here and let me see you;" so then one of the girls took me down there in my car to Dr. Gerraughty's office, and I went up and Dr. Gerraughty looked at me and he says, "You have just got the hives," and laughed about it, and he told me where to get—what to get for it, and he gave me a prescription; and I went home and bathed my face in it and that didn't do any good, so then I called in another doctor.

Q. Well, was that Dr. Kraal?

A. No, that was Dr. Hines.

Q. Dr. Hines?

A. Yes.

Q. In the Gibraltar building? I mean the Rialto building?

A. Yes. So then Dr. Hines, it got him; he didn't know what it was. He says, "Call a skin specialist." So I says, "Let me call Dr. Miller, because Dr. Miller knows me."

Q. Doctor who?

A. Dr. Miller, in Dr. Sutton's office. So I says, "I want to get out of this; I have got to get back to the shop."

Q. I know, but what did he do then? He sent for Dr. Miller?

A. He sent for Dr. Miller, and Dr. Miller came out with Dr. Hines, and Dr. Miller says, "This looks like arsenical poisoning."

Q. He said arsenical poisoning, didn't he?

A. He said arsenical poisoning.

Q. Did he call it arsenical dermatitis? That means inflammation of the skin.

A. I don't remember [*remember*] whether he called it that or not. I was swelled out of recognition, and my eyes were almost closed, and I was just in a terrible fix.

Q. Now, they pronounced that arsenical poisoning. Then didn't they send you to Dr. Krall?

A. No, I got worse all the time and I had a high temperature, and Dr. Hines says to my husband, "I have done all I can do"——

Q. Well, never mind. Dr. Hines gave up, did he, treating—he gave up trying to cure you in any way?

A. No, he didn't give me up, but he says, "I have done all I can do. I don't know what else to do." So my sister asked him if he didn't know of another good man, and he says, "Well, let me think," and he went to the telephone and called up Dr. Krall and asked him to come over.

[fol. 313] Q. Dr. Krall. Now, Dr. Krall is at the St. Margaret's hospital in Kansas City, Kansas, isn't he?

A. He is.

Q. Now, did he go to see you or did you go to see him; Dr. Krall?

A. Dr. Krall came to my house.

Q. He did?

A. Yes, sir.

Q. And didn't he diagnose it as arsenical poisoning, too?

A. Well, he didn't tell me, but he told my husband.

Q. He said it was arsenical poisoning, didn't he?

A. I don't know, but he told my husband.

Q. What?

A. I say he told my husband; he didn't tell me.

Q. But he told your husband, then, it was arsenical poisoning, is what I am getting at. Did he pronounce it arsenical poisoning?

A. I think he did.

Q. That is what I am getting at. Now, then having pronounced it arsenical poisoning, he had you go to the St. Margaret's hospital in Kansas City, Kansas, didn't he?

A. Yes.

Q. And you were there for how long, under his treatment?

A. One month.

Q. One month?

A. Yes.

Q. During that month you showed considerable improvement, didn't you?

A. No.

Q. Didn't you notice any improvement at all?

A. No.

Q. Then didn't he commence giving you treatment, too, of some kind of medicine?

A. He never gave me any injections, if that is what you mean.

Q. No, I mean the treatment. He gave you medicine internally, didn't he?

A. Yes, he gave my capsules.

Q. Capsules. Did he tell you that it was—that those capsules contained bismuth?

A. No.

Q. He didn't tell you what they contained?

A. No.

Q. Now, after you had Dr. Krall and Dr. Gerraughty and Dr. Woody, didn't you then go see Dr. Matthias?

A. Dr. Matthias, I believe, was in—I had Dr. Matthias in there some time, but I never took any of his treatments.

Q. Now, then, after that, after you had Dr. Krall and Dr. Matthias, have you had any other doctor at all?

A. No, not a doctor. I went to Battle Creek.

Q. I know you went to Battle Creek up there to see some doctor there, didn't you?

A. He wasn't a doctor. He is what they call a "human mechanic," because I always had that pain where the train [fol. 314] threw my head down in my shoulders; I couldn't breathe, and——

Q. You went to see him, didn't you?

A. He called himself a "human mechanic."

Q. A human mechanic?

A. That is what he calls himself.

Q. How old a man is he?

A. About 70 years old.

Q. About 70?

A. Yes.

Q. Was he a graduate of any medical school, do you know?

A. No, he wasn't a doctor.

Q. Was he a graduate of any osteopathic school?

A. That I don't know.

Q. Was he a graduate—as a matter of fact, didn't he claim to have a peculiar discovery of his own that he was using?

A. Well, I know that he worked along on the order of an osteopath or a chiropractor.

Q. He did. Now, then, didn't you notice an improvement, then, after he gave you this treatment there?

A. Only that I could breathe a little better.

Q. How?

A. Only that I could breathe a little better.

Q. Breathe better. Well, that was an improvement, wasn't it?

A. Yes.

Q. Now, then, how long were you up in Michigan at Battle Creek with him?

A. I took a 10-day treatment. I didn't take any medicine.

Q. I know; it was just the——

A. Just like a chiropractor.

Q. By massaging and chiropractic methods, is that it?

A. Yes, sir.

Q. Now, when you came back did you go get any doctor?

A. No.

Q. And you haven't had any doctor since, have you?

A. No.

Q. How old did you say you were now?

A. I am 32.

Q. You are younger than Imogene, aren't you?

A. Yes, sir.

Q. She is about how much older than you?

A. I don't know.

Q. Now, then, did Dr. Hines give you any treatments at all?

A. He and Dr. Miller worked together, and they put a white—like a white paste over my face.

Q. A white paste on your face?

A. Yes.

[fol. 315] Q. Did they give you any hypodermic injections at all?

A. No.

Q. Neither one of them?

A. No.

Q. And I believe you said that Dr. Krall only gave you capsules?

A. Yes, sir.

Mr. Marley: That is all.

Redirect examination.

By Mr. Chilcott:

Q. Does your husband smoke cigarettes?

A. Yes, sir.

Q. Did you ever have cigarette smoke bother you or nauseate you?

A. No, sir.

Q. Did it on this occasion?

A. No, sir.

Q. Now, Mrs. Johnson, I don't know whether I qualified her—I don't know whether I asked you this question or not. Mr. Wickersham thinks I didn't ask this question. What experience have you had in traveling in passenger trains?

The Court: Mr. Wickersham is right. You didn't ask that.

The Witness: What is the question again, please?

By Mr. Chilcott:

Q. I want you to tell the court just what experience you have had in traveling in passenger cars and passenger trains before this accident.

A. Well, as a child I traveled with my mother and father. My father's position was a foreman of a section gang, and we traveled in box cars.

Q. How long did you travel in box cars with him?

A. Well, I don't know just for how long, but I presume it was a year or two.

Q. How old were you at that time?

A. I was about 10 or 11 years old.

Q. Now, what experience have you had in traveling in passenger trains in recent years, before this accident?

A. Well, I have been to New York twice, and I have been to San Francisco and Canada, and to Washington, and St. Paul, Minneapolis, and Oregon, and Oklahoma, St. Louis, Chicago.

Q. Had you ridden over the New York Central prior to this time?

A. I have.

Q. Are you familiar with the usual and ordinary jerks of a passenger train, and lurches?

A. I am.

Q. I want you to state whether or not this jerk and lurch and jolt of which you have testified was a usual and ordinary, or unusual and extraordinary?

A. It was unusual——

[fol. 316] Mr. Marley: Wait a minute. Wait a minute. That is objected to as incompetent because she [isn't] shown that she has had experience under similar conditions, and she hasn't qualified to testify as an expert as to the conditions under which this happened.

The Court: Well, on these various trips of yours, Mrs. Johnson, you were traveling on passenger trains, weren't you?

A. Yes, sir.

The Court: Objection overruled.

Mr. Marley: Save an exception.

(To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company by its counsel, then and there at the time duly excepted and still excepts.)

(To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company by its counsel then and there at the time duly excepted and still excepts.)

By Mr. Chilcott:

Q. Just answer the question.

A. Very unusual and very, very extraordinary.

Mr. Chilcott: That is all.

The Court: Anything further, Mr. Marley?

Mr. Marley: I believe that is all.

The Court: That is all.

(Witness excused.)

The Court: Call your next witness.

SUE O'BLENESS was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please.
A. Sue O'Bleness.
Q. And where do you live?
A. 2815 Monroe.
Q. Kansas City, Missouri?
A. Kansas City, Missouri.
Q. Do you know the plaintiff in this case, Mrytle Johnson?
[fol. 317] A. Yes, sir.
Q. How long have you known Mrs. Johnson?
A. About four years.
Q. Do you know what her condition of health was, her apparent condition of health was, prior to September, 1925?
A. I do.
Q. Tell the jury what you observed about her——

Mr. Marley: Wait a minute. I object to that, your honor, as incompetent. The question he has qualified her as to is apparent condition. Now, does he mean by this that he is going into details as to everything she observed, or is she going to speak about her apparent condition?
Mr. Chilcott: Her apparent condition of health.

Q. Tell what you observed about her apparent condition of health.
A. Well, she seemed very active in everything that she done. Her business, her social activities——

Mr. Marley: I object to those answers and move to strike them out as not responsive to the question.
The Court: Sustained.

By Mr. Chilcott:

Q. How much did she appear to weigh?
A. Well, I should judge about 155 or 160.

Q. What did you observe in regard to the color of her face?

A. To my knowledge, her coloring was very good; not artificial.

Mr. Marley: I move to strike that answer out, your honor, as incompetent; conclusion of the witness.

The Court: I didn't understand the answer.

Mr. Marley: She says to my knowledge. She doesn't speak of an appearance, but she spoke of knowing it absolutely.

The Court: Well, that is the way some people would use that expression, but state only what you observed, Mrs. O'Bleness.

By Mr. Chilcott:

Q. Just state what you observed; what her color appeared to be.

A. Very good.

Q. Now, what did you observe in regard to the way she carried herself when she would be walking?

[fol. 318] A. She walked very efficiently.

Q. How is that?

A. She walked same as any other person.

Q. Well, was she erect, or [*stopped?*]

A. No.

Q. State whether she walked quickly or slowly.

A. Well, she walked——

Q. Stepped rapidly?

A. She walked rapidly, yes.

Q. And what did you observe in regard to the movements of her hands?

A. They were very good.

Q. What did you observe, if anything, in regard to her manner of speech?

A. Excellent.

Q. Could you hear what she said when she would talk to you?

A. Yes, sir.

Q. State whether or not her voice was strong and carried well.

A. Her voice was strong and she spoke distinctly.

Q. Do you know anything about the athletics that she indulged in?

A. Yes, sir.

Q. What were they?

A. Golf, singing, and dancing.

Q. State with what ability she was able to play golf and dance?

Mr. Marley: Wait a minute. I object to that, your honor, as incompetent.

Mr. Chilcott: All right, let it go.

Q. Now, Mrs. O'Bleness, what have you observed in regard to Mrs.—how frequently have you seen her since she was injured?

A. On the average of about once a month.

Q. What have you observed in regard to her physical appearance since she was injured?

A. Well, it seems she couldn't walk as well as she did before.

Q. What did you observe in regard to her walk?

A. She couldn't move her right foot.

Q. How did it act?

A. She seemed to drag it.

Q. What did you observe in regard to her using her right hand?

A. Well, she couldn't lift it up. That is, it seemsd she couldn't lift it or move it, and I have seen her take her left hand and lift her right hand up.

Q. What have you to say in regard to her manner of speech?

[fol. 319] A. Well, in the first eight months or so I could hardly understand the girl when she talked.

Q. Then what happened?

Q. Well, of course, she speaks a little better now.

Q. State whether or not she speaks as she did—at the present time, as she did before she was injured.

A. No, sir.

Q. What difference do you note?

A. She don't seem to be able to say her words distinctly. They all run together.

Q. What have you to say in regard to the strength of her voice?

A. She doesn't have the strength.

Mr. Marley: I move to strike that answer out, you honor, as incompetent.

The Court: Sustained.

By Mr. Chilcott:

Q. State whether or not—what have you noticed in regard to her voice, whether she speaks loudly or not now as compared to what it was before she was injured.

A. No, she doesn't have the volume. She doesn't have the strength in her voice that she had before.

Mr. Marley: I move to strike the answer out, your honor.

The Court: That portion of the answer will be stricken out beginning with the words "she doesn't have the strength."

Mr. Chilcott: Yes.

Q. Now, what have you noticed in regard to her ability to carry on and continue a line of conversation?

A. Well, she seems not to be able to talk like she did before. Her words are not distinct and they all run together.

Q. What, if anything, have you noticed in regard to her memory?

A. Well, she doesn't seem to remember the things that occurred before she went to New York.

Q. Have you ever felt of her right hand?

A. Yes.

Q. What does it feel like?

A. Feels limp.

By Mr. Marley:

Q. Feels what?

A. Limp.

Mr. Chilcott: That is all.

Mr. Marley: No cross-examination.

[fol. 320] The Court: That is all.

(Witness excused.)

The Court: Call your next witness.

ANNA BLANCHE BLAND was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. Now, Mrs. Bland, I wish you would speak up so that the last juror can hear what you say. Where do you live, Mrs. Bland?

A. 3331 Wabash.

Q. Do you know the plaintiff in this case, Mrs. Myrtle Johnson?

A. Yes, sir.

Q. How long have you known her?

A. Between eight and nine years.

Q. State what opportunity you had to observe her and her activities prior to September, 1925.

A. Well, we were very good friends, socially.

Q. How often would you see her?

A. About once or twice a week.

Q. What was her apparent condition of health at that time?

A. Well, she appeared to be in the very best of health.

Q. Describe her to the jury.

A. She was full of pep—it is kind of hard to do—she was full of pep, and liked to dance, liked to play golf, and she was always happy, in the best of humor, made friends easily.

Q. Did you ever observe anything in regard to her apparent condition of health that was out of the ordinary and not normal?

A. No, sir.

Q. Now, what did you observe prior to her injury in regard to her nervous condition?

A. You mean before she was injured?

Q. Before she was hurt.

A. Well, she never seemed to be nervous.

Q. Now, Mrs. Bland, what have you observed about her since she was injured?

A. Well, she seems to be very, very nervous; she cries at the least little thing. For instance, if a friend would

come in the room that she hadn't seen, maybe, for a week or two——

Mr. Marley: That, if your honor please, we object to.

The Court: Overruled.

[fol. 321] Mr. Marley: Exception noted.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Chilcott:

Q. Just proceed.

A. If a friend comes in the room that she hasn't seen for a week or two she breaks down and cries.

Q. Did you ever notice anything like that before she was injured?

A. Oh, no.

Q. About what was her apparent weight before she was injured?

A. She was pretty fat. About a hundred—well, I imagine—I am not very good at that, but I imagine about 158, maybe a little more, maybe a little less; but she was what you would call chunky.

Q. And what have you observed in regard to her weight since her injury?

A. Well, she was very thin for a while, but now she has picked up a little bit.

Q. How did she carry herself before she was injured; get around; whether she was [stopped] or erect and alert, or——

A. Oh, no, she was very straight and alert; walked fast.

Q. What have you observed about her in that regard since she was injured?

A. Well, she can't walk very fast now, and she drags her right foot.

Q. I want you to state about her general appearance in regard to youthfulness before she was injured.

The Court: In regard to what?

Mr. Chilcott: Her youthfulness; her appearance in regard to being youthful.

Mr. Marley: You mean her apparent youthfulness?

Mr. Chilcott: Yes, apparent youthfulness.

A. Well, she was the picture of health. She had rosy cheeks, always wanted to do everything anyone else wanted to do——

[fol. 322] Mr. Marley: That I object to, your honor.

The Court: Sustained.

By Mr. Chilcott:

Q. How does she look now compared to that appearance that you have just stated; how does she appear to you?

A. Well, she looks very different. She looks lifeless; pepless.

Q. Have you observed her attempting to use her right hand since she was injured?

A. Yes. She can't—she don't seem like when she picks up anything she can't pick it up; she don't seem to have any strength. Oh, I have been with her when she tried to wash dishes. I think that was one of the doctor's orders, that she should wash dishes.

Mr. Marley: Wait a minute. I move to strike the answer out.

The Court: Stricken out.

By Mr. Chilcott:

Q. Just state what she did when she would attempt to wash dishes.

A. She would wash the dishes and she would drop the dishes.

Q. What have you noticed, if anything, in regard to her memory, and her ability to carry on a continuous conversation?

A. Well, seems like she forgets. She will talk to you in a sentence and break off in the middle of a sentence and start talking about something else.

Q. Did you ever notice anything of that kind prior to the injury?

A. Oh, no.

Q. Now, what do you know about her ability to drive an automobile, before she was injured?

A. She was a very good driver.

Q. Have you observed her in driving an automobile since she was injured?

A. Yes, sir.

Q. State how she does it.

A. Well, she kind of puts her right hand up on the wheel and seems to kind of guide it with her arm in here some way, I don't know, and then always shifts with her left hand.

Q. I want to ask you, Mrs. Bland, whether or not you have observed any improvement in the way she gets around in the last six or eight months?

A. No, sir.

Q. Have you noticed any improvement in any way in that period of time in the way she gets around?

[fol. 323] A. No, I haven't.

Mr. Chilcott: That is all.

By Mr. Marley:

Q. You and Mrs. Johnson are very good friends, aren't you?

A. Yes, sir.

Q. And have been for quite a while?

A. Yes, sir.

Q. Close, warm, personal friends?

A. Yes, sir.

Mr. Marley: That is all.

(Witness excused.)

The Court: Call your next.

D. H. Smith was thereupon called as a witness on behalf of of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please.

A. D. H. Smith.

Q. Where do you live, Mr. Smith?

A. I live at 4408 Harrison, is my residence.

Q. And are you familiar with the location of Mrs. Johnson's beauty shop known as the Jane's Beauty Shop?

A. Yes, sir. I own that building.

Q. You own that building. How long have you known Mrs. Smith?

A. Mrs. Johnson, you mean?

Q. Pardon me; Mrs. Johnson.

A. Why, ever since 1922, the 1st day of November, I think was the time I rented her the place.

Q. What opportunity did you have and how often did you see her since then up to the time she was injured?

A. Well, off and on nearly every day. I had my office right opposite the hall in the same building.

Q. What was her general appearance in regard to health at that time?

A. Well, when she leased those rooms she seemed to be robust; in good health.

Q. About how much did she appear to weigh?

A. How is that.

Q. How much did she appear to weigh?

A. Well, probably 145 or 150.

Q. And how did she get around on her feet; carry herself?

[fol. 324] A. Well, she was quick and active, and she was industrious and a good worker.

Q. State with what frequency she came down to her shop, if you know.

A. Well, she come very regular; every day.

Q. Now, what have you observed about her since she was injured?

A. Please state that question again.

Mr. Chilcott: Read the question.

(Question read as above recorded.)

A. Oh, since she was injured. Well, of course, she was—didn't look like the same person. That is, she is thin and——

Mr. Marley: I move to strike out the answer, "she didn't look like the same person."

The Court: Yes.

By Mr. Chilcott:

Q. Just state how she appeared, Mr. Smith. What did her weight appear to be.

A. Oh, her weight. Well, she seemed to be about 125, something like that.

Q. What differences have you noted in her?

A. You mean in her appearance?

Q. Yes, her appearance in regard to health and ability to get around.

A. Oh, there was a good deal of difference, certainly. She looked thinner, you know, and she couldn't get around; her complexion wasn't rosy, you know; wasn't like it had been, you know, before.

Q. Did you observe anything in regard to the way she walked?

A. Oh, yes, she couldn't walk. She walked—limped, you know, with one foot, with her right foot.

Q. Did you observe how she used her right hand?

A. Well, she couldn't use it very much, you know. I met her several times, and I would ask her how her hand was, and if it was cold I would just rub it for her, you know, until it got warm again. It was simply cold.

Q. And how frequently would she appear at her shop since she was injured, if you have observed?

A. Well, at first—let me see. About—she appeared about last month; I think she come in now and then before previous to that. It was just occasionally, you know.

Q. Just the last month?

A. Yes.

Mr. Chilcott: I guess that is all.

[fol. 325] Mr. Marley: That is all.

(Witness excused.)

The Court: Call your next witness.

Mrs. Mary Ellwanger, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. What is your name?

A. Mrs. Mary Ellwanger.

Q. Are you any relation to the plaintiff, Mrs. Johnson?
A. She is my daughter.
Q. Now, have you been familiar with her general condition of health all through her life?
A. Yes, sir.
Q. What was her apparent health prior to her injury?
A. She always had good health, never had a doctor.

Mr. Marley: I move to strike that out, unless she is testifying to appearance. Is that what you mean, her appearance?

A. Yes, she always seemed in good health.
Q. What opportunity did you have to see or observe her before her injury?
A. I was with her.
Q. How often?
A. Every day.
Q. Every day?
A. Yes, sir.
Q. And how did she appear in regard to being nervous or not, nervous, irritable?
A. Before she wasn't nervous, didn't appear to be.
Q. What was her apparent weight before she was injured?
A. Right around 159, I think. We were both weighed together.
Q. When did you see her after her injury first?
A. Well, they wouldn't let me know the morning they brought her in.

Mr. Marley: Object to that, and move it be stricken out.
The Court: Sustained.

By Mr. Chilcott:

Q. You have got to state when you first saw her.
A. I saw her the next morning.
Q. And where did you see her?
A. In the Grace Hospital.
[fol. 326] Q. How did she appear to you?
A. Well, she was just lying on the bed, and her face was drawn down and she just seemed to move her fingers just a little.

Q. Did you feel of her hand?

A. Yes.

Q. What did it feel like?

A. It was cold and clammy like?

Q. And how often did you see her then?

A. Every day.

Q. Did you remain with her very long?

A. Quite a bit, yes, sir; all day long.

Q. And when was she taken to her home?

A. I think in about nine or ten days.

Q. And who took care of her after she was taken to her home?

A. I was there every day with her.

Q. Every day. Now, I want you to state what was done with her when she went home; tell the jury whether she went to bed or stayed up?

A. Oh, she was in bed.

Q. How long did she remain in bed continuously?

A. I think around—I think it was around October, the latter part.

Q. That she got out of bed?

A. But she didn't stay up.

Q. How long did she stay up?

A. She would stay up just a while at a time, and then lie down again.

Q. And how long was she up and down like that?

A. I just couldn't tell you exactly.

Q. Just your best recollection?

A. It was a long time, I can't just tell you, I don't know.

Q. Can you estimate it?

A. I don't know just how long it was, I don't remember.

Q. How long was it after she was injured before she was able to walk, before you observed her walking with help?

A. Well, with help she could walk around the latter part of October, one on each side, almost carry her.

Q. Have you observed any improvement in her since that time?

A. She improved, seemed to, done a little better for a while, but not of late.

Q. How long has it been since you have noticed any improvement in her at all?

A. Oh, she hasn't improved the last six months, six or eight months, somewhere about like that.

[fol. 327] Q. State how she partook of her food?

A. Well, she would go to eat, and she wouldn't seem, she couldn't control her hand, or something, couldn't get it to her mouth, didn't seem to find her mouth, and she would drop her food.

Q. What did you observe, if anything, in regard to her ability to chew and swallow her food?

A. Well, it seems there was something wrong in her throat about swallowing.

Q. State what effect you observed—what effort you observed her to make in doing that?

A. Well, it seemed to me it took all the effort she could get, she was slow in grasping it and getting it.

Q. Now, Mrs. Ellwanger, before she got hurt, state what she did, if anything, in regard to her household duties?

A. Well, of course she had a shop. She used to get up of mornings early and go out and play golf, some mornings—

Mr. Marley: I object as not responsive to the question.

The Court: Sustained.

Q. What sort—state what she did in regard to her household duties, cooking and washing dishes and making beds?

A. She could do all her household work and would do her laundry at night.

Q. I see. State what you have observed her doing in regard to her household duties since she was injured?

A. Nothing, she can't do anything, can't hold anything.

Mr. Chilcott: You may take the witness.

Cross-examination.

By Mr. Marley:

Q. You are her mother, aren't you?

A. Yes, sir.

Mr. Marley: That is all.

(Witness excused.)

Mr. Chilcott: Now, your Honor, we have three more doctors, and they were to be here at 1:30, and I have a couple of

depositions that will take up the time until twelve o'clock if Mr. Marley has looked them over.

Mr. Marley: They were submitted to me today, or rather yesterday, they were taken last Saturday, and I didn't get [fol. 328] them until yesterday, and I haven't had time to look them over.

The Court: Let's go ahead and not waste time.

Mr. Marley: You can get them and read them, and I will read them at the same time.

Mr. Wickersham: We offer in evidence the deposition of Frances E. McCarron, direct examination by Mr. Chilcott.

Frances E. McCarron, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith as follows, to-wit:

"Direct examination.

By Mr. Chilcott:

Q. State your name please?
A. Frances E. McCarron.
Q. Where do you live?
A. At Galena, just out of Springfield.

Mr. Marley: Wait a minute, what is the name of the place. A little louder please.

A. Galena.
Q. Galena?
A. Out on the Frisco.
Q. Do you know the plaintiff, Mrs. Myrtle J. Johnson?"

Mr. Marley: The Court has consolidated the two cases, and I take it we can drop the rest of that.

Mr. Wickersham (continuing reading deposition):

"Q. How long have you known Mrs. Johnson?
A. About four years and a half.
Q. What is the nature of your acquaintance with her?
A. Business and friendship.
Q. How often have you seen her in the last four years?
A. I used to see her two or three times a week.
Q. How long ago?
A. Well, that has been more than two years ago—that frequently.

Q. Was that before or subsequent to the 17th day of September, 1925?

A. Before.

Q. How often did you see her prior to that time?

A. On an average of three or four times a week.

Q. What was her appearance at that time?

A. She was a very healthy, virile, robust woman."

[fol. 329] Mr. Marley: I put in an objection there to strike that out. Her answer was "She was a very healthy, virile, robust woman." Objected to because she is not an expert witness, and incompetent and a conclusion of the witness.

The Court: Sustained.

Mr. Wickersham (continues reading):

"By Mr. Chilcott: Just state what you saw, you cannot give your conclusion. Just state what you saw, how she appeared to you.

A. She was extremely active.

Q. Yes.

A. And she was intelligent.

Q. How did she carry herself when she would walk?

A. Active, actively very.

Q. Was she erect or stooped?

A. Decidedly erect.

Q. About how much did she weigh, if you know?

A. Well, I would judge by my appearance and I weighed around about 160 pounds, and she was just about my size.

Q. What kind of a color did she have in her face?

A. It was rosy.

Q. What did you observe in regard to her speech?

A. It was excellent.

Q. What do you mean by excellent?

A. Well, she had no impediment or anything.

Q. What did you observe in regard to her right hand and foot?

A. She had absolutely——"

Mr. Marley: I believe on that, it is answered a little later on. It was objected to as assuming that she observed her right hand and foot. I think she afterwards said she did, so that I will not press that objection.

Mr. Wickersham (continues reading):

"Q. Did you observe her right hand and foot?
A. Naturally.
Q. Well, did you?
A. I did.
Q. What was its appearance before she got hurt.
A. It was normal.
Q. How did you notice that? You have stated how she used it, what you saw her do?
A. Well, she used it actively in her work?
Q. What kind of work did she do?
A. Would you say Beauty Parlor work?
Q. If that is what she did.
A. That is what she did.
[fol. 330] Q. What did you observe her doing, how did you observe her using that hand in the Beauty Parlor work?
A. Well, she gave baths, permanents, massages, manicures, marcels and shampoos.
Q. How did she give a permanent with them, if you ever saw her give one?
A. She was very active—speedy.
Q. I mean state whether she had to use her right hand?
A. Oh, absolutely.
Q. Much or little?
A. A great deal.
Q. State with what dexterity she used her right hand in giving permanent waves?

Mr. Marley: That is objected to as suggestive and leading and incompetent.
The Court: Overruled.
Mr. Marley: Exception.

To which action and ruling of the court, the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Wickersham (continues reading):

"Q. Just answer the question.
A. With what dexterity, was the question?
Q. Yes.
A. With great dexterity."

Mr. Marley: I move to strike that out as incompetent; not an apparent dexterity, she states it as an expert opinion.

The Court: Motion overruled.
Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

[fol. 331] Mr. Wickersham (continues reading):

"Q. State whether or not Mrs. Johnson operated a beauty parlor at that time?
A. She did.
Q. Whereabouts?
A. At 4611 Troost.
Q. Do you know whether she owned it or working for somebody else?
A. Well, she owned it, it was her own.
Q. Now, I want you to state what difference, if any, you have noticed in her subsequent to the 27th day of September, 1925?
A. Well, she doesn't talk, she is not her natural self."

Mr. Marley: I object to that part, "She is not her natural self."

The Court: Sustained.

Mr. Wickersham (continues reading): "State what you noticed about her speech, if anything?

A. Immediately after her injury she could not talk at all so we could understand her and it is still very hesitant.

Q. What was her appearance of her face at that time?
A. Of her injury.
Q. After the 27th day of September, 1925, or immediately afterwards?
A. Her face was drawn out of shape.
Q. Which side was drawn?"

Mr. Marley: I don't press that objection, that is withdrawn.

Mr. Wickersham (goes on reading):

"Q. State what her face looked like?
A. Well, her chin was drawn to the left side of her face.
Q. What was the appearance of the right side of her face?
A. Well, I do not know whether I could describe it. However, it was not natural, it was drawn. The flesh seemed too pallid, clammy.
Q. Ever feel of it?
A. Yes.
Q. How did it feel like?
A. Cold and clammy like.
Q. What was the appearance of her right hand and right leg after this injury?
A. Well, she carried her arm close to her body as life less."

Mr. Marley: That I objected to as not responsive to the question.
[fol. 332] The Court: Objection sustained.

Mr. Wickersham (continues reading):

"A. And her leg and foot she dragged them. She walked with a sort of a hitch, or rather moved it with a sort of a hitch, and drug her foot."

Mr. Marley: Object to that as not responsive to the question.
The Court: That is the same question?
Mr. Wickersham: Same question. "What was the appearance of her right hand and leg after this injury?"
The Court: Overruled.
Mr. Marley: Note an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then *then* and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel then and there at the time duly excepted, and still excepts.

Mr. Wickersham (continuing reading):

"Q. How long was it after she was hurt that you first saw her?

A. Well, it was perhaps six or seven weeks.

Q. Where was she when you first saw her?

A. She was in her home.

Q. Where was she?

A. On Harrison. Wasn't that it? Harrison, I believe, I have really forgotten.

Q. Was she in the house there when you saw her?

A. She was sitting in a chair.

Q. What was her appearance?

A. Well, she was inactive and could not talk to her with any degree of understanding whatever.

Q. Why?"

Mr. Marley: That objection where I objected to tell the reason why as incompetent testimony, that objection is withdrawn.

Mr. Wickersham (continues reading):

"Q. State how it appeared to you?

[fol. 333] A. Well, if you spoke to her, say if you were sitting in there, she would just break out in hysteria, she would cry or her mind would wander if you were talking to her and she might start out talking on one thing and she would lose contact of the thought and branch out into something else or stop altogether."

Mr. Marley: Move to strike that answer out as not responsive to the question.

Mr. Wickersham: The question is, "State how it appeared to you."

Mr. Marley: "State how it appeared to you," and then it goes on and described this condition.

Mr. Wickersham: "Was she in the house there when you saw her?

A. She was sitting in a chair.

Q. What was her appearance?

A. Well, she was inactive and could not talk to her with any degree of understanding whatever.

Q. Why." The question is why. That is the question; why couldn't you talk to her with any degree of understanding. I submit it is responsive to the question.

Mr. Marley: Then the question "State how it appeared to you," and instead of stating appearance, she relates different things.

The Court: Objection overruled.

Mr. Marley: Note an exception, please.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there in open court excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there in open court excepted and still excepts.

Mr. Wickersham (continues reading):

"Q. How long did that condition continue that you know of?

A. Well, I took her with me to my home in the country the following January, and she was still in that condition. I lost track of her then for several months, but when I met her after that period of absence she was still almost as bad as she was then."

[fol. 234] Mr. Marley: Now, I object to that part, "She was still almost as bad as she was then." Object to it as incompetent.

The Court: Sustained.

Mr. Wickersham (continues reading): "How did she appear to you the next time.

A. She appeared very much like she was when I had last seen her in January.

Q. Did you observe how she got around at that time?

A. Yes, I did.

Q. Well, describe how she got around?

A. Well, she still drug her foot and walked with a hitch.

Q. What did you observe, if anything, in regard to her speech?

A. It was slightly better at that time.

Q. What, if anything, did you observe in regard to the way her face was drawn, if it was drawn?

A. Well, her face was getting better at that time, it was not drawn quite so much as it was drawn the last time I had seen her.

Q. How recently have you made an observation of Mrs. Johnson?

A. I have not seen her since the 18th of December until I came up this last May.

Q. What do you observe about her now?"

Mr. Marley: Will withdraw that objection.

Mr. Wickersham (continues reading): "She is the same as she was when I saw her at that time.

Q. What do you observe in regard to her weight at the present time?

A. She is much lighter than she was.

Q. What did you observe in regard to her weight at the time when she went to your farm or down in the country with you?

A. I do not just recollect that, but it seems to me I was under the impression she was a little bit heavier than she is now.

Q. How would she walk when she was down on your place?

A. She walked with that hitch, that halting way and dragging her foot.

Q. Now, I wish you would state whether you have ever observed Mrs. Johnson try to use her right hand since she was injured.

[fol. 335] A. Only in picking up her handkerchief or a piece of paper, but her hand was always up to her body, her arm."

Mr. Marley: That is objected to because it is not responsive to the question.

The Court: Overruled.

Mr. Marley: Note exception please.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Wickersham (continues reading):

"Q. Describe how her fingers would go when you would see her attempt to pick up something.

A. Well, they were very slow and halting and she lacked strength to grasp anything."

Mr. Marley: I object to that, "She lacked strength to grasp anything" as not responsive to the question.

The Court: The last should be stricken out.

Mr. Wickersham (continues reading):

"Mr. Chilcott: Well, you cannot say that. You have got to say what it was that indicated to you that she lacked strength.

A. Well, in her effort to move or pick up any object, I know it took her ever so long a time to attempt to get to it, and when she did she could not pick it up, she could not do what she had involuntarily attempted to do.

Q. Did you ever observe her attempt to write with her right hand?

A. Not since her——

Q. (Interrupting.) Do you know whether she was right handed or left handed before she was injured?

A. Right handed.

Q. Which hand do you observe her using more now since the injury?

A. Her left hand.

Q. Have you recently felt of her right hand?

A. Day before yesterday.

Q. Describe how it felt to you?
A. Well, it is cold——

[fol. 336] Mr. Marley. The objection is withdrawn, nothing to that.

Q. Cold. Just proceed.
A. Cold and lifeless, sort of clammy feeling.
Q. What musical instruments did she play, if any, before she was injured?
A. The piano, banjo, ukulele.
Q. State whether or not she ever sang that you know of before she was injured?

Mr. Marley: That objection is withdrawn.

Mr. Wickersham (continues reading):

"A. She sang and whistled all the time.
Q. Have you observed her playing the piano since she was injured?
A. No, sir.
Q. Have you observed her trying to play it?
A. I did this morning.
Q. State what her appearance was when she would attempt to play the piano with her right hand?
A. She was awkward and she could play with her left hand, that was the only hand she had on the instrument."

Mr. Marley: Move to strike that answer out as a conclusion of the witness.
Mr. Wickersham: All right.
The Court: Be stricken out.

Mr. Wickersham (continues reading):

"Q. Did you observe her making any endeavor to play with her right hand?
A. No.
Q. Now, have you heard Mrs. Johnson make any complaints in regard to her physical being?"

Mr. Marley: That we objected to.
The Court: Sustained.

Mr. Wickersham: Now, the next two questions are on the same point, and I will not present them (continues reading):

"Q. Now, what have you noticed, if anything, in regard to Mrs. Johnson's continuity of speech when she would be talking to you?

A. Recently?"

Mr. Marley: That objection is withdrawn.

The Court: Gentlemen, during the recess of the court, you will not discuss this case or permit anyone to discuss it with you. We will stand at recess until 1:30 o'clock.

[fol. 337] (Whereupon at 12:00 o'clock noon, a recess was had until 1:30 o'clock, February 22, 1927.)

After Recess—1:30 p. m.

Mr. Wickersham: We were reading the deposition, your Honor, and the last question was:

"Q. What have you noticed, if anything, in regard to Mrs. Johnson's ability to carry on an articulate and continuous conversation," and an objection was interposed.

Mr. Marley: I withdraw that objection.

Mr. Wickersham (continues reading):

"Q. Just answer the question.

A. Well, just how would I word that. She cannot talk or does not talk."

Mr. Marley: I move to strike out "She cannot talk or does not talk."

The Court: Objection sustained.

Mr. Wickersham: Now, going down to the answer that follows after Mr. Chilcott's speech (continues reading):

"A. Well, she stops talking—we start talking about a thing and she stops, she cannot remember.

Mr. Marley: Objection as a part of the same conversation, same answer.

The Court: Overruled.

Mr. Marley: Exception, your Honor, please.

To which action and ruling of the court, the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Wickersham (continues reading):

"A. I am just at a loss of words just now to express it. You cannot carry on a continuous conversation with her simply because she——"

[fol. 338] Mr. Marley: That we objected to.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. Now go ahead and continue what your answer was.

A. Start talking about a certain thing and she stops and asks us again what we are talking about because she has lost the—"

and then there is an objection.

The Court: The words beginning with "She has lost" will be stricken out.

Mr. Marley: The word "because" before "She has lost" should be stricken out also?

The Court: Yes, sir.

Mr. Wickersham (continues reading):

"Q. Have you ever seen her attempt to sew?

A. Not since the accident.

Q. Have you ever seen her attempt to wash dishes?

A. Not since the accident.

Q. Who took care of her house work before she was injured?

A. She did that herself.

Q. Do you know who takes care of it now?

A. She has maids.

Q. Do you know whether she had much or little trade at her beauty parlor, prior to her injury?"

Mr. Marley: I will withdraw that objection.

Mr. Wickersham (continues reading):

"A. She has a continuous line of customers.
Q. Male or female?
A. Female.
Q. And have you observed her shop since she was injured?
A. Yes.
Q. State what you observed in regard to the patronage?
A. Her trade has fallen off greatly."

Mr. Marley: I object to that answer, because it would have to be made on the assumption that the continuous line of trade kept up.

The Court: Overruled.

Mr. Marley: Exception noted, please

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Rail-[fol. 339] way Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Wickersham (continues reading):

"Q. Did you ever observe her when she was attempting to wash dishes?
A. Not since the accident.
Q. Well now, when she was down at your house I want you to state what you noticed in her appearance and her ability to walk and get about when she was down at your place?
A. Well, she got about very haltingly.
Q. Very what?
A. Very haltingly.
Q. I see.
A. She drug her foot.
Q. Yes.
A. And I was constantly on the alert to help her."

Mr. Marley: That I objected to, your Honor.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State whether or not she would walk without assistance when down at your place?"

Mr. Marley: I will withdraw that objection.

Mr. Wickersham (continues reading):

"A. Yes, she did. In her way.
Q. What do you mean by "in her way?"
A. In her halting, hesitating way, dragging her foot you know.
Q. How long was that after she was injured?
A. Five months.
Q. What improvement, if any, have you observed in her since that time?"

And then an objection.

Mr. Marley: That is objected to as a conclusion, it isn't apparent improvement.
The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State what you observed in regard to her speech at the present time.
[fol. 340] A. It is somewhat better than it was but."

Mr. Wickersham: That is all the direct examination.
Mr. Marley: I will not introduce the cross-examination, I think it covers the same thing.
Mr. Wickersham: Let me glance over it a moment.
Mr. Marley: You might want the redirect, "If she was going to leave Kansas City soon," but as she was a non-resident, I am not making that point.
The Court: You agreed to take the deposition——
Mr. Marley: Yes, agreed to taking the deposition, and also agreed to waiving the signature, and admitted that she was a resident of Kansas, and I am not standing on that.
Mr. Wickersham: There is another deposition here, but I have a doctor that I would like to put on.
The Court: All right, call the doctor.

Doctor Edward Geraughty, a witness called by the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. State your name, Doctor.
A. Doctor Edward Geraughty.
Q. Are you a regular licensed practicing physician in the state of Missouri?
A. Yes, sir.
Q. How long have you been admitted to practice?
A. Since 1903.
Q. How long have you practiced in Kansas City?
A. All that time.
Q. Are you a physician and surgeon?
A. Yes, sir.
Q. Doctor Geraughty, during those twenty-four years of practice, have you in your profession treated few or many patients who had injuries of the head?
A. Yes, sir.

The Court: Your answer is not very clear—the question was few or many. Do you mean many?

A. I have treated many.
Q. And in cases of nervousness, have you treated many of those?
A. Yes, sir.
Q. Do you know Mrs. Myrtle Johnson?
A. Yes, sir.
Q. Were you her physician since the 27th of September, 1925?
A. Yes, sir.
[fol. 341] Q. When did you first meet her professionally?
A. I was over to see her mother; called on her mother once or twice, and the daughter, Mrs. Johnson, came in and I met her at that time. That was in the early part of March, 1926.
Q. Did you obtain from her a history of having had an accident?
A. Yes, sir.
Q. And did you begin any treatment of her?
A. When I visited her mother, she asked me— —

Mr. Marley: Object to that as not responsive to the question.

A. What is the question.

(Question read as above recorded.)

A. Not this day, later on.

Q. State the circumstances.

Mr. Marley: The question was not as to any particular date, but did he begin a treatment of any kind, that is the question. I would like for him to answer it that way.

A. The treatment was commenced sometimes after the first meeting of the patient, yes, sir.

By Mr. Wickersham:

Q. Before you actually began to administer to her, did you obtain any history of her of any blood tests that she had previously had?

A. In our experience of treating——

Mr. Marley: I object to the answer as not responsive to the question.

By Mr. Wickersham:

Q. Just answer the question.

A. I went into the history of the case thoroughly, of course, into all the history of her injury, history of everything; her personal history was taken into consideration; yes, sir.

Q. And were you advised as to whether or not she had a Wasserman test?

A. Yes, sir.

Mr. Marley: Object to it, your Honor, as incompetent and hearsay.

The Court: Overruled.

Mr. Marley: Save an exception.

[fol. 342] To which action and ruling of the court the defendant in the case of Edward T. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Do you remember whether the test showed it was negative or positive?

A. Yes, sir.

Q. What was it?

A. Showed negative.

Mr. Marley: I move to strike that out as incompetent and hearsay.

Mr. Wickersham: Did you learn it from the plaintiff?

A. Yes.

The Court: I don't see where it makes any difference whether he learned it from the plaintiff or not. I think it is competent. Go ahead.

Mr. Marley: Note an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Mrytle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Now, Doctor, I want you to tell what examination you made of the plaintiff at the time and what condition she was in at that time?

A. I made an appointment to visit her at her home at 4015 Harrison at that time, and went out there and spent something like an hour and a half or two hours on her case, going over the case thoroughly, every bit of the case in detail, the history of her accident and injury, her paralysis she then had and now has, and the history of the case up to the time I examined her, and at that time she reported

again that there had been a Wassermann test made, and it had been negative

Mr. Marley: I object to that Wassermann test had been negative, as hearsay.

[fol. 343] The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and and there at the time duly excepted and still excepts.

A. And then I examined her personally, examined her throat, her skin, her reflexes, her glands, generally all *all* over body.

Q. And what was her condition at that time as far as her right side was concerned?

A. She had what we term in medicine, hemiplegia, which means paralysis of half the body, one side. This was right-sided hemiplegia.

Q. Now, Doctor, may a blow, violence upon the left side of the head be sufficient to cause a hemiplegia such as you found?

A. Yes, sir.

Mr. Marley: Object to that as incompetent, not based upon sufficient facts and calling for an opinion without hypothetical facts upon which to base it, and I object to it as incompetent.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Now, Doctor, what will you say as to her speech at that time?

A. Speech? The most [*promanent*] symptom was in the right leg, as it arose out of the lower part of the body to the upper part of the body, the symptoms were reduced in virus so that the speech was not so inarticulately disturbed, not so disturbed as the right leg, and the speech was disturbed so that it was incoherent and not clear.

[fol. 344] Q. Now, Doctor, what course of treatment did you administer?

A. I adminstered a course of treatment for a possible chance of eliminating any trouble, that might be, might possibly be associated with, connected with this trouble other than traumatism, figuring that may be there might be some other reasons for hemiplegia in this case; I administered to her iodides, arsenic and mercury.

Q. So that the jury may understand, you have used the word "Traumatism" tell the jury that [*that*] means so that they will not misunderstand?

A. Traumatism means in short term, blow, violence.

Q. Now, what was the character of the treatment; how did you administer those medicines?

A. All the medicines except the iodides were given by hypodermic, hypodermic needle, injected into the body and into the arms and into the muscles of the back.

Q. Doctor, what is a Wassermann test used by your profession for?

A. Wassermann test is used for the opportunity and ability to discover the disease syphilis in the blood.

Q. And what does it mean when you say that the Wassermann shows negative?

A. That is evidence that syphilis does not exist.

Q. And having learned that the test showed negative, and syphilis didn't exist, why did you give the treatment that you have told us you did give?

A. Well, that is an important thing. I wanted to be real sure. I wanted to be very sure. I subjected this patient to medical test of arsenic and iodides and mercury to be real sure that even after the negative test, she might not have had syphilis.

Q. Doctor, prior to the discovery of the Wassermann test in your profession, what was the usual and ordinary and well recognized test in the medical profession to determine the presence, if any, of syphilis in the blood?

A. Used iodides and mercury, and then used arsenic as a test, and did then and do now where there are cases where there is any possibility of their being of therapeutic value—I would use the word therapeutic because it means test with medicine. If a patient had malaria fever, and on the halfway mark between typhoid and malaria, and if a quantity of quinine was given and had no effect, the evidence would be toward typhoid and away from malaria. And this treatment was given to see if it would give any response to the [fol. 345] other condition that might have caused hemiplegia, and unfortunately, it showed no signs of syphilis.

Q. And now, then after giving your tests of those medicines, did you discover any evidence whatever, of any syphilis condition of the blood?

A. No, sir.

Q. Did you discover any evidence whatever of neurosyphilis?

A. No, sir.

Q. What do you understand by the word neurosyphilis?

A. Neuro means nervous and syphilis has its usual meaning; neurosyphilis would be syphilis of the nervous system.

Q. After all the treatment you gave her, did you discover anything whatver, any evidence whatever, of neurosyphilis?

A. No, sir.

Q. What conclusion did you come to after your treatment as to what was her ailment?

Mr. Marley: That is objected to as incompetent. I take it he is trying to bring it to the one answer, but I don't believe the witness has shown from his answer that he could deduce the answer that counsel is expecting to get, and I object to the question as calling for an answer that is incompetent.

The Court: Overruled.

Mr. Marley: Exception noted.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Q. What was the question?

Q. What conclusion did you come to after your treatment as to what was her ailment?

A. The conclusion was that the patient suffered a traumatism, traumatic hemiplegia.

Q. Now, Doctor, I want you to tell the court and the jury what were the symptoms and the facts concerning her condition that caused you to come to the conclusion that hers was a case of traumatic hemiplegia.

A. My treatment shows I was a little bit skeptical and there——

[fol. 346] Mr. Marley: Move to strike it out.

The Court: Strike it out.

A. The test to prove the case is traumatic hemiplegia are these. First the lack of Argyll Robertson pupil. This patient respondents to the lights in the eye correctly. The absence of skin symptoms, the absence of throat symptoms, the absence of bone symptoms, the exaggerated knee reflexes, the absence of enlarged glands, marked, and the very unsatisfactory response to arsenic, mercury, iodide treatment.

Q. Now, we have the list, and we will go over them to understand them thoroughly. What is the Argyll Robertson test?

A. It is a test of the light on the eye, on the pupil, and when the eye has no response to light, stays large instead of getting down small and fails to react, that is known as the Argyll Robertson test, and is very likely to do that in syphilis. This patient's accommodation to light was perfectly normal. The eye would accommodate itself right down to a pin point.

Q. In other words, you have a light that you hold in front of the patient's eye?

A. Yes.

Q. And if there is a syphilitic condition, what is the action of the eye?

A. Stays wide open.

Q. Stays wide open. And if there is some traumatism, traumatic hemiplegia, what happens to the eye with the light held in front of them?

A. The eyes react to light and close down.

Q. And in this case with this woman, was there reaction?

A. It went down to pin points.

Q. Now, we understand about that test. Is that a well recognized test in the medical profession?

A. A very good one, yes, sir.

Q. Now, we will take the next with the glands of the body. Tell us about that exactly so that this jury will understand.

A. Glands of the body are little fortresses building along lymphs channels that carry off some poisons. It is well recognized——

Mr. Marley: Objected to that.

The Court: Sustained.

A. These glands are little fortresses building along the lymphs channels that carry off infection, and they get enlarged, and we find gland enlargement, nodules, sometimes as big as marbles, larger sometimes.

[fol. 347] Q. Did you find any such condition that indicated in any way a syphilitic or bad blood condition in this woman?

A. No, sir.

Q. Now, then, with reference to the skin, I want you to tell what that test is, and whether or not it is well recognized in the medical profession?

A. The skin, of course, is one of the tests we find if there are any eruptive conditions. The disease characterizes itself by many forms of eruptions, and when it is found it is characteristic of the disease. We looked her over very carefully, and her skin is perfectly clear, no existence of eruption.

Q. You spoke about bony condition; what did you mean by that?

A. In syphilis, the bones of the body seem to be affected very prominently, pains in the bone, especially in the shin bone. It has been very characteristic in the chronic cases.

Mr. Marley: We object to that because there is no evidence of a chronic case.

Mr. Wickersham: Let the record show that he doesn't claim that.

Mr. Marley: The chronic case would be in the tertiary state.

The Court: He may describe it.

A. The bones would be tender and there would be pains along the shin bone, darting pains, especially at night time, and especially in the shin bones.

Q. What condition did you find this woman's bones in, and particularly the shin bone?

A. Normal.

Q. Now, you have spoken about the knee reflexes, patella reflexes. What is that, and what is the purpose of making that test?

A. To discover the susceptibility or sensitivity of the nerves as they pass over the patella. They are very superficial there and exposed and if you tap on them, you can get a response, and there is a normal response to any nerve tissue in that area. If that response is exaggerated or diminished, it has a medical meaning, and that is the purpose of making that test also.

Q. Now, Doctor, in cases where there is any syphilis, what is the natural and ordinary thing to be expected in making such a test?

A. In syphilis as a rule, the reflexes are diminished.

[fol. 348] Q. And what is the situation that you found in this woman?

A. Reflexes were exaggerated.

Q. Did you make a patella reflex test of her this very noon?

A. Yes, sir.

Q. What did you find then, Doctor?

A. Exaggerated, markedly so.

Q. What conclusion did you draw, sir, from the use of that test as to whether the thing she is suffering from is traumatic hemiplogia or any bad condition of the blood?

A. Traumatic hemiplegia.

Q. Now, Doctor, what is the function of iodide in such cases, what is it for?

A. Elimination; stimulates the body to elimination. Iodides and iodine.

Q. And Doctor, is it a fact, well recognized fact in medical profession that individuals have idiosyncrasies so far as their reaction to certain medicines are concerned?

A. Yes, sir.

Q. Now, what do you mean by that?

A. Idiosyncrasies is, are, susceptibility to any medicine.

Mr. Marley: I object to this, I don't think there is any evidence of idiosyncrasy in this case so far.

Mr. Wickersham: We are going to show it right now.

Q. Did this woman in your opinion after the experience you had in giving these medicines, have an idiosyncrasy so far as those medicines are concerned?

A. Yes, sir.

Q. Now, what do you mean by that?

A. I mean the susceptibility, susceptibility to that drug. I will give you a little illustration. Some people if they eat strawberries will have a rash on the body. We call that susceptibility. It is much more prominent in drugs, iodine and drugs of that nature. Idiosyncrasy means susceptibility of either drugs or foods or anything else taken into the human body.

Q. Now, going to another subject. Let us assume as facts that Mrs. Myrtle Johnson was enjoying good health prior to the 27th day of September, 1925, weighed approximately 160 pounds, that she had not had medical treatment for a great many years of any illness; that on the evening or night of that day she was on a train, going from New York City to Chicago, in New York State—going from New York City to Chicago, Illinois, and she was in New York State, between the hours of eleven and twelve in the evening, and that she was standing in the aisle of a [fol. 349] Pullman car adjacent to a berth that was made down, and holding the folds of the curtain of the berth, toward the rear end of it, in her right hand, and that there was a sudden and violent jerk, lurch and apparent stopping, tendency to stop the train, and she was thrown forward and around and struck the left [*left*] side of her head against the bottom of the upper berth, the side of the upper berth, edge of it, and she was thrown to the floor and car-

ried away from her grip on the curtain, and that she was down in the floor was holding her head, and saying, "Oh my head, oh, my head," and things turned black, and she lost consciousness for a short space of time, and that she was then picked up and placed on the edge of the berth and taken to the ladies' dressing room and bathed with cold water, her face, and then she was undressed and put to bed, and the next morning, sometime shortly before noon, she awakened and her right side, arm and leg were paralyzed, unable to use them, and they felt cold and clammy, and unable to speak, right side of her tongue in the same paralytic condition, and then she remained in that condition, she was taken from the train, taken on the train to Chicago, carried off and put in a wheel chair, and taken from one depot to the other, and then put on a train for Kansas City, and when she arrived in Kansas City, was taken to the Grace Hospital where she remained about nine days, and that during that time that there was some improvement of the paralytic condition of the right side and then that she left and went to her home that is, was taken to her home, remained in bed for some time until along in November, except on one occasion, and that there was some improvement in the use of her right side, leg and arm, and that she then was in the condition which you found her upon your examination of her—I will ask you Doctor, assuming all those facts to be true, whether or not in your opinion the violence which I have indicated in the question could cause the condition which you found?

Mr. Marley: To which we object as incompetent, and omitting facts that should be in evidence—omitting facts in evidence and including facts not in evidence.

The Court: Overruled.

By Mr. Wickersham:

Q. And assuming the treatment all the way through was proper treatment——

The Court: Overrule the objection.

[fol. 350] Mr. Marley: Note our exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Rail-

way Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

A. I answer yes. That the history related——

Mr. Marley: I move to strike out everything after the word, "yes."

The Court: Sustained.

Q. Now, Doctor, hurrying along, there are two tables to the skull, and what is the membrane immediately underneath the inner table?

A. Diploe.

Q. And where is the dura mater?

A. Under that.

Q. What is under that?

A. Pia mater.

Q. Now, then, Doctor, given a blow upon the left side of the head—may a blow upon the left side of the head cause a fracture on the opposite side?

A. Below——

Mr. Marley: I object to that as incompetent because there is no evidence of any fracture on this side of the head in this case. I object as it is incompetent.

The Court: Sustained.

By Mr. Wickersham:

Q. Doctor, may you have a blow upon the head such as I have described and not fracture the bones of the skull and still cause a lesion of the tissue inside?

A. Yes, sir.

Mr. Marley: You mean inside of the side of the skull that receives the blow or the other side—the question is a little bit too broad.

The Court: I assume he meant beneath the place where the blow was struck.

By Mr. Wickersham:

Q. Yes, may it have that?

A. Yes. Not only beneath where the injury was, but it might fracture it across on the other side.

Mr. Marley: Object to that, that is not responsive to the question, and no evidence of that kind here.

[fol. 351] The Court: Overruled.

Mr. Wickersham: But this is enlightening to the jury.

Mr. Marley: I object as incompetent.

The Court: Overruled.

Mr. Marley: Note exception.

To which action and ruling of the court, the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. Now, what happens, Doctor, when there is a blow inflicted on the left side of the head and there is a lesion of the tissues underneath it, what do you mean by that?

A. We mean there is a disturbance in the functioning power of the brain underneath; it might come from a fracture with depressed bones, depressed portion of the bone, it may come from hemorrhage, it may come from organized blood clot, it may come from traumatism, any thickening where there is any pressure, there will be a disturbance of the functioning.

Q. And if, on the 27th day of September, 1925, a blow would be inflicted on the side of the head that would cause a lesion of the tissues underneath, does it or does it not take some lapse of time for any scar tissue to form there?

A. Yes, sir; scar tissue is slow in formation; yes, sir.

Q. And will the pressure of such scar tissue be—may it in case be observed by X-ray later on?

A. Yes, sir.

Q. Now, Doctor, what have you to say of the permanency of these conditions which you have described?

A. Patient hasn't made any improvement that I can see at all since I first saw her in March, 1926.

Mr. Marley: Object to that question, and move to strike it out as not responsive to the question, the answer, as I understand the question, he was wanting to know the nature and character of injury of that kind.

A. He asked about the permanency.

[fol. 352] Mr. Marley: Of an injury of that kind, but not with reference to this particular case.

Q. No, Mr. Marley, with reference to this woman.

A. The case has remained in a stationary condition, and I would think is now permanent.

Q. Is that your opinion now, that her condition is now permanent?

A. Right now.

Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Doctor, when you speak about iodide, you mean iodide potassium, don't you?

A. Not necessarily.

Q. In this particular case, did you give her iodide of potassium?

A. No, I think I gave her soluble iodide.

Q. When a patient is given iodide potassium, so many drops every few hours, what is that ordinarily for, what kind of a disease?

A. We use that, it is one of the major drugs in the treatment of syphilis.

Q. And before they discovered the salvarsan, it is or was the principal medicine in the treatment of syphilis?

A. Yes, sir, very prominent, and still is.

Q. And when a party would come in and you suspected that syphilis was present in their system, you would commence giving them iodide potassium?

A. Very often.

Q. And that was really the rule and practice in the medical profession prior to the discovery of salvarsan?

A. Yes, sir.

Q. Now, in this particular case, these injections you spoke of of mercury and arsenic, wasn't that salvarsan?

A. I didn't give salvarsan, I gave soluble salvarsan, because I gave it with a hypodermic rather than internal.

Q. But it has the same effect?

A. Yes, sir.

Q. And for the same purpose?

A. Yes, sir.

Q. So you gave it for the purpose of eliminating any syphilis that might be in the system?

A. Yes.

Q. There are three stages of syphilis, are they not?

A. Generally considered.

Q. Called the primary, secondary and tertiary?

A. Yes, sir.

Q. Primary is supposed to be skin disease?

A. Not necessary.

[fol. 353] Q. I mean the development itself is primarily in the skin?

A. We first have the initial sore—may not always find it—which is called [chancer], and that may be very small, very insignificant and hidden away.

Q. And very frequently ladies may acquire it by drinking out of cups, or kissing people that might have a [chancer] on the lips?

A. Yes, sir.

Q. And it is very common to acquire it that way?

A. I wouldn't say common.

Q. But frequent?

A. Yes, sir; frequent.

Q. And many a woman goes along suffering from syphilis and knows nothing about it?

A. Men also. Yes, sir.

Q. But more often women. When it is in the first stage, you call it the shanker stage, and it begins to affect the skin next, does it not?

A. Not always.

Q. Well, as a general rule, there is always exceptions to rules, Doctor.

A. As a rule the secondary state, secondary symptoms is the skin.

Q. This germ is what is called spirochaeta?

A. Yes, sir.

Q. Spirochaeta pallida? That is the full name. The first test they use is what is called the Wasserman test of the blood to find out that condition?

A. Yes, sir; Wassermann test is used.

Q. After it goes beyond that stage, and gets into the stage of neurosyphilis, the blood test is not accurate?

A. The blood test is not absolutely accurate in any stage of it.

Q. Now, however, where there is neurosyphilis, to make a sure test of it, don't they generally make a test of the fluid of the spinal cord taken from the lumbar region?

A. That is sometimes done. I don't think the spinal fluid test is any more important than the blood test, if as important. The Wassermann test is more often used and the most important by long odds, either in neurosyphilis or any other stage of syphilis.

Q. There is a difference of opinion in medical men, isn't there, Doctor? Some think it is almost an infallible test?

A. No, sir; the other day——

Q. I don't care what happened the other day, what I want to know is what is the general opinion of the profession.

Mr. Wickersham: Let him answer.

[fol. 354] Q. Now, you mean to say then that in the medical profession they don't attach any importance to the test of the fluid of the spinal cord taken from the lumbar region in a test for neurosyphilis?

A. Yes, they attach a certain amount of importance to both tests, of the blood and of serum of the spine taken from the lumbar region both in neurosyphilis and any other kind. I answered the question first by telling you that neither is absolute or positive, and we do attach importance to one or both, but not more to one than the other.

Q. Now, when you first saw Mrs. Johnson, you became suspicious of locomotor ataxia, didn't you?

A. No, sir; I didn't.

Q. You didn't have any suspicion at all?

A. I will answer that and tell you in cases of this kind—

Q. I want to know in this case.

A. I will answer this case, and tell you why I gave her this treatment. I gave her this treatment because it is possible for doctors to make mistakes, it is pos-ible to make mistakes on any case, and it is possible for all the doctors in Kansas City to make a mistake in a given case, and she hadn't had any treatment, and I felt something ought to be done to give her an opportunity, and I personally urged her to take the test to see how it would come out, and she accepted it on my word, and it didn't come out the way I thought it would, or didn't help her.

Q. And she left you shortly after that?

A. Yes, sir.

Q. And went to some other doctor?

A. Yes, sir.

Q. Do you know what doctor she went to?

A. I don't know who she got just after she ceased treatment from me, I don't know who was called.

Q. Now, taking up the question of lesions in what is called neurosyphilis, Doctor, doesn't it form along in the tissue and along the nerves what is called gummatous formations?

A. Yes, sir.

Q. And they are tubercules, are they?

A. Yes, sir.

Q. And they press on the nerve, the tissue that is next to it?

A. Yes, sir.

Q. And it keeps on increasing until it presses down and paralysis is the result, isn't that right?

A. Yes, sir.

Q. It is generally between, it is along the arachnoid membrane?

A. Yes, sir.

Q. And that is between the dura mater and the pia mater?

A. Yes, sir.

Q. And it also gets in the menengis?

A. Yes, sir.

[fol. 355] Q. That is what covers the brain the spinal cord and everything?

A. Yes, sir; outside coating.

Q. After that is done, doesn't it begin to form there so as to paralyze one side of the body and by pressure cause what you call occlusion?

A. Yes, sir.

Q. And presses down, and isn't there a formation what you doctors call there a thrombosis formation?

A. I wouldn't say thrombosis in that case; it is a foreign body carried around and deposited in the end of an artery. Thrombosis is the blocking of any foreign substance in the blood.

Q. Isn't that embolus?

A. Both very close together. Thrombosis is an embolus that has stopped.

Q. Doesn't it form generally on the outside and embolus on the inside of the blood vessel?

A. No, they may form either way. Of course they are caused by a great many different things. Thrombosis is very often caused by heart trouble.

Q. This reaction to your treatment, as developed in this treatment of Mrs. Johnson, alarmed you very much, didn't it?

A. I didn't happen to see her very much, I didn't see much of her afterwards. The treatment didn't do her any good.

Q. And it was really injurious?

A. No permanent injury, I don't think. It would make her feel pretty bad, and give her a pretty nasty skin eruption that she would get from that drug, pretty nasty skin eruption from arsenic. I never saw her afterwards, but I know she must have felt pretty bad, and I gave her the medicine.

Q. Now, I believe you testified, Doctor, that you saw her first at her mother's?

A. Yes.

Q. Now, at the time you saw her at her mother's, you didn't treat her, did you?

A. No, sir.

Q. Now, about when after that did you commence to treat her?

A. I presume about two weeks, something like that.

Q. About when did that—when would that be, can you give the month or the year or the day of the month?

A. Latter part of March, 1926.

Q. Latter part of March, 1926?

A. Yes.

Q. And your treatment ran how long?

A. Oh, probably five or six weeks.

Q. Five or six weeks?

A. Yes, sir.

Q. You gave her these injections about three times a week?

A. Yes, two or three times a week, yes, sir.

[fol. 356] Q. That injection is a pretty strong solution, isn't it?

A. Yes, pretty strong.

Mr. Marley: That is all.

Redirect examination.

By Mr. Wickersham:

Q. Doctor, I note that in your cross-examination you said that you did not give this substance veinously.

A. Interveinously, you mean. That means inside the vein.

Q. Why didn't you do that with this woman?

A. I was afraid to. Her condition was too precarious; her health wouldn't warrant it, and I felt we should use the medicine for chemical test that has been outlined, and we gave her the test and gave it to her hypodermically into her muscles. Intermuscular.

Q. Interveinously is in the veins and intermuscular is in the muscles?

A. Yes, sir.

Q. And also on cross-examination, stress has been laid upon this spine test. I want you to tell the jury whether there is any real grave danger attendant upon taking the fluid from the spinal column?

A. Yes, it is a serious matter to take the fluid out of the spinal cord, and you are liable to get infection into the cord, and it gives the patient a very marked shock, and this patient under the circumstances it wasn't war-antable at all to take her spinal fluid. I would say that when a patient is good and strong as some of you men are, we

might perhaps take the spinal fluid in case of hemiplegia, after taking many other tests previous to taking that test, but it is much more shocking than the treatment I gave her, which didn't work out.

Q. Now, Doctor, on cross-examination also your attention has been called to the development of neurosyphilis, and you have been interrogated about what happens in the brain in the progress of that disease, and if it causes sometimes paralysis. I want you to tell the jury what is the normal progress of neurosyphilis as far as it becomes really evident is concerned?

A. As becomes which?

Q. As becoming really active as to cause paralysis, it is a sudden quick thing, or is it a slow and long developing process?

A. Slow degenerating process piling up very, very slowly.

Q. If you have the fact before you that a woman in good health, ap-arently in excellent physical condition, is standing beside a berth of a Pullman car, holding on to the [fol. 357] curtains, and there was a sudden lurch or apparent stopping of that train, and was thrown violently around and strike the left side of her head upon the upper part of the berth, and that is between eleven and twelve o'clock at night, and before twelve o'clock the next day she is paralyzed on her right side, I will ask you whether that is any evidence whatever in your opinion as to her having any neurosyphilis?

A. Certainly is not.

Q. Is that any evidence in your opinion that she has traumatic hemiplegia?

Mr. Marley: Object to that as incompetent.

The Court: Sustained. It has been gone over anyway.

Recross-examination.

By Mr. Marley:

Q. Now, isn't it a fact, Doctor Geraughty, that in neurosyphilis, it is slow and [insidu*o*us,] it is true, but it sometimes reaches a state that even a slight shock will bring on the [paraletic] stroke, hemiplegia, as you call it?

A. Yes, occasionally. Occasionally a case can come quick under those circumstances.

Mr. Marley: That is all.

Redirect examination.

By Mr. Wickersham:

Q. Explain that situation as far as the evidence in this case is concerned?

A. The evidence in this case, of course, points away from that. Had this patient shown symptoms and given other evidence of having had an old syphilis and then had an injury, then it is possible that a quick paralysis might have occurred with previous history, if the patient had been worked up to the point where—could have been worked up to that point, but with the history showing the traumatic condition, the evidence points to traumatic hemiplegia rather than neurosyphilis.

Q. And if she had had such a neurosyphilis as counsel indicates, it would have been natural and reasonable that you would have had some evidence of it from the glands?

A. Yes.

Q. Some evidence from the bones?

A. Yes, in a general way; some evidence of syphilis would have been present, of course, the neurosyphilis is a type of syphilis which includes the nerves of the central nervous system.

[fol. 358] Q. And if there was anything, any neurosyphilis that was the cause of the paralysis coming into quick action from the blow, would you have any reflex in the woman today?

A. We would have a slow reflex.

Q. And the fact is she—the fact that she had exaggerated reflex there today be any evidence——

Mr. Marley: Object to leading the witness.

The Court: That has all been gone over.

(Witness excused.)

WILLIAM H. HINES, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name please.

A. William H. [Hones.]

Q. And are you a regularly licensed and practicing physician of Kansas City, Missouri?

A. Yes, sir.

Q. Were you called upon to treat Mrs. Myrtle Johnson, the plaintiff in this case along in April or May, 1926?

A. Yes, sir.

Q. What did you find her suffering with?

A. Arsenical dermatitis.

Q. Just tell the court and jury what condition you found her in?

A. I found her in bed, eyes swollen shut, face all swollen and rash all over her body, arsenic rash.

Q. Did you take any history of her case at that time?

A. I did not.

Q. Did you give her any treatment?

A. I did.

Q. What did you give her?

A. I treated her for arsenic poisoning.

Q. Did you have any consultation with any other physicians?

A. Doctor Sherman Mella, and Doctor Krall.

Q. About how long did you remain in the case?

A. About two weeks.

Q. How often did you see her?

A. Twice, once or twice daily.

Q. State how her case progressed?

A. She did improve and get better.

Q. What was finally done with her?

A. Under the care of Doctor Krall she went to St. Margaret's Hospital.

[fol. 359] Q. Did you see any evidence while you were treating her of chronic disease such as syphilis?

A. I did not examine her for that, and didn't inquire.

Q. Was there anything to indicate about her that indicated she had such a disease?

A. Nothing that I noticed.

Cross-examination.

By Mr. Marley:

Q. Doctor, did she tell you that she had a Wassermann test and that it showed positive?

A. No, sir.

Q. And all you know——

A. Is that she had been taking an arsenic treatment.

Q. And then you referred the case to Doctor Krall, didn't you?

A. Yes, sir. I didn't give her the arsenic treatment, I treated her for the arsenic poisoning.

Q. You found her suffering from arsenical dermatitis?

A. Yes, sir.

Q. And you treated her for that and finally she went over to Doctor Krall?

A. Yes, sir.

Q. Were you making any progress in your treatment at all?

A. Yes, sir.

Mr. Marley: That is all.

(Witness excused.)

Doctor Sherman Mella, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please?

A. Doctor Sherman Mella.

Q. And what is your profession?

A. Physician.

Q. Do you have any—do you specialize along any particular line?

A. Yes, sir.

Q. What line?

A. I am a skin specialist, dermatologist.

Q. Were you called in consultation with Doctor Hines and Doctor Krall in regard to the treatment of Mrs. Myrtle Johnson?

A. I was called in about the nature of the case.

Q. Did you make an examination of her?

A. I did.

Q. What did you find her suffering with?

[fol. 360] Arsenical dermatitis.

Q. Just what is that?

A. It is an inflammatory process in the skin due to arsenic inoculation.

Q. Did you give her any treatment for that?

A. I saw her on consultation, and advised treatment.

Q. And who administered that treatment, do you know?

A. Doctor Hines, and later Doctor Krall.

Q. I forget whether you said you made an examination of her or not?

A. I did, yes, sir.

Q. Where was she when you made that examination?

A. At her home.

Q. Tell the jury what her appearance was?

A. Well, at that time, she had a marked redness of the skin with a scaling of the skin which is typical of arsenical dermatitis, and she was having quite high temperature, and was feeling pretty sick at that time.

Q. Doctor, did you see any evidence of any syphilis?

A. I did not.

Q. And you turned her over to Doctor Krall?

A. I was called in consultation with Doctor Hines, and after that Doctor Krall saw her.

Mr. Chilcott. That is all.

Cross-examination.

By Mr. Marley:

Q. But doctor, you didn't make any examination as to her blood condition at all?

A. I did not, no, sir.

(Witness excused.)

Mr. F. W. Nelson, witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. Mr. Nelson, where do you live—state your name first.
A. F. W. Nelson.
Q. Where do you live?
A. Kansas City.
Q. What is your business?
A. Cashier of Park National Bank.
Q. Do you know Mrs. Myrtle Johnson?
A. Yes, sir.
Q. How long have you known her?
A. Five years.
[fol. 361] Q. Is her place of business close to yours?
A. In the same block.
Q. How often have you seen her in the last five years?
A. Up to the time she got hurt, I saw her practically every day.
Q. State what her appearance was in regard to color and how she got around, and what her activities were, if you know?
A. She was a perfectly normal woman up until the time she left on this trip. I sold her the travellers checks. She was always jolly and apparently in good health.
Q. What did you notice about her apparent condition since she made that trip?
A. She is very much the opposite.
Q. State what you have noticed about her?
A. She has been ill, I don't know how much of the time, bedfast a good deal of the time; she has lost, practically lost the use of certain members of her body.

Mr. Marley: I move to strike that out, she has lost, etc.
The Court: Yes.

A. It appears that she has lost the partial use of her body.

Mr. Marley: That, your honor please, is a voluntary statement, and move to strike it out.
The Court: Stricken out.

By Mr. Chilcott:

Q. Just state how you observed her to walk along when she is walking?

A. She travels along, I will say——

Q. How is that?

A. She doesn't walk natural.

Q. What have you observed in regard to her weight?

A. She is much lighter than before.

Q. What have you observed in regard to the color of her face?

A. She has lost the healthy look and color in her face.

Mr. Chilcott: That is all. You may examine.

Mr. Marley: No questions.

(Witness excused.)

Mr. Wickersham: Offer in evidence the deposition of Murray H. Sure, taken last Saturday under agreement. [fol. 362] Mr. Marley: Let the record show it was under the same agreement as the other deposition.

Mr. Wickersham (reading):

"MURRAY H. SURE, of lawful age, being produced, sworn, and examined as a witness on the part of the plaintiff, deposeth and saith as follows, to-wit:

Direct examination.

By Mr. Chilcott:

Q. State your name, please?

A. Murray H. Shure.

Q. Where do you live?

A. New York City, 281 Wadsworth Avenue.

Q. What is your business?

A. Field Manager of the C. Nestle Company.

Q. How long have you been such?

A. Been in that position since the 18th of October.

Q. This last October?

A. Yes.

Q. What did you do prior to that time?

A. District Sales Manager.

Q. For whom?

A. The C. Nestle Company.

Q. How long were you District Sales Manager?

A. Two and a half years.

Q. Were you District Sales Manager on the 27th day of September, 1925?

A. I was.

Q. State how long you will be in Kansas City?

A. Be here until tomorrow night at 11:45.

Q. Did you say New York was your permanent residence?

A. Yes.

Q. Do you know the plaintiff in this case, Mrs. Myrtle Johnson?

A. I do.

Q. How long have you known her?

A. Since July, 1925.

Q. What was her physical appearance when you met her?

A. She was in perfect physical condition."

Mr. Marley: I object to that, it is incompetent——

The Court: Strike it out.

A. I will state the story what made me think that way.

Q. Yes, state what indicated to you that she was——

Mr. Marley: I object to that. Let the Court read the answer.

The Court: That is stricken out.

Mr. Wickersham: Then there is a lot of conversation between the lawyers that I will not read. (Continues reading:)

[fol. 363] "Q. Just a minute. I will ask you the question to state where she was when you first saw her in Kansas City?

A. The first time I saw her in Kansas City, she was in the shop doing a permanent wave.

Q. What shop?

A. 4611 Troost.

Q. State whether or not you observed her actions while she was doing that permanent wave?

A. While she was doing that permanent wave she was one of the speediest operators I have seen in many a day."

Mr. Marley: I object to that, "She was one of the speediest operators I have seen in many a day."
The Court: Stricken out.

Mr. Wickersham (continues reading):

"Q. State what observation you have made in observing permanent machine operators?
A. The average one is extremely slow."

Mr. Marley: Object to that as not responsive and incompetent.
The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State what experience you have had in observing permanent machine operators?
A. I was—while working with the company I was at the time instructor for them through the country, and it was up to me when one of our salesmen sold a machine to teach these people and see they are competent to do the wave and keep up the reputation of our company.
Q. You observed her while she was operating this machine?
A. I did.
Q. State with what speed, accuracy and dexterity she operated this machine?
A. The speed with which she worked was so fast and she was so agile that we selected her to be the demonstrator for the C. Nestle Company in Kansas City."

Mr. Marley: Move to strike out that whole answer.
The Court: Motion sustained.

Mr. Wickersham (continues reading):

"Q. State, as a result of your observations, state what you had her do?
A. I beg your pardon: I did not get you. What I had her do for me?
[fol. 364] Q. Yes.
A. To act as demonstrator for the C. Nestle Company in front of all the hairdressers at the Muehlebach Hotel."

Mr. Marley: Object to that and move to strike it out as incompetent.

The Court: Overruled.

Mr. Marley: Exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railway Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Wickersham (continues reading):

"Q. Why did you have her do that," top of page 24, and I don't offer that. I think all the questions and answers on page 24 are subject to objection.

Mr. Marley: And page 25 the same way?

Mr. Wickersham: I haven't read it all yet. Down at the bottom of page 25 (continues reading):

"Q. State what you observed about her condition, regardless of where you saw her?

A. I was dancing with her.

Q. That gave you an opportunity to observe——"

Mr. Marley: That is objected to as not responsive to the question.

Mr. Wickersham: All right. (Continues reading:)

"Q. That gave you an opportunity to observe her but the law will not permit you to state what you were doing; do you get what I mean?

A. Well, I can't very well get anywhere with one trying to question and one objecting; I don't know how to answer it; every question asked has been objected to so far."

Mr. Marley: I move to strike that out, "I don't know how to answer it; every question asked has been objected to so far."

The Court: Objection sustained.

[fol. 365] Mr. Wickersham:

"Q. Well now here, I will ask you this: state what opportunity you had at the time you state to observe her physical appearance?

Mr. Marley: You mean at the time of this demonstration?
Q. At the time he was here in Kansas City.
Mr. Marley: In July?
Q. In July.
Mr. Marley: 1925?
Q. 1925.

A. Why, she was much heavier at the time."

Mr. Marley: I object to that, "She was much heavier at the time," and move to strike it out.
The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. I asked you to state what opportunity you had to observe her?

A. Well, I have opportunity the afternoon when I was in her shop talking to her for the first time; that evening at the Muehlbach Hotel; they dined me at the Kansas City Athletic Club roof garden and we went out driving the following night to the Hill Crest Country Club.

Q. Now, what did you observe in regard to her physical appearance?

A. I observed at that time that she was much more robust than she is at the present time."

Mr. Marley: I move to strike out that, "Much more robust than she is at the present time, as incompetent."

Mr. Wickersham: All right. (Continues reading:)

"Q. State how she appeared at that time with reference to how she is now?

A. She was walking perfectly straight; as good as I was at the time.

Q. What did you observe in regard to her weight; about how much would she weigh?

A. As to weight I could not say, but I positively know she was much heavier then than she is now; face much fuller."

Mr. Marley: I object to that and move to strike it out, where it says, "She was much heavier then than she is [fol. 366] now, face much fuller," as a mere voluntary statement, and not responsive to the question.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State how she carried herself?

A. To my estimation she was full of energy all the time, worked extremely fast."

Mr. Marley: Move to strike that out.

The Court: Sustained, not responsive to the question.

Mr. Wickersham (continues reading):

"Q. State how she carried herself, whether she was stooped or erect or anything that you noticed about how she carried herself when she would walk along?

Mr. Marley: So far as he noticed.

A. She worked—when she was working for me I noticed her more than before."

Mr. Marley: Object to it as not responsive to the question.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State how she carried herself when you observed her?

A. She walked perfectly straight.

Q. State whether her head was back or bent?

A. Her whole physical appearance was in perfect condition, she walked and sat perfectly erect; when she worked she used both hands very well when she was working for me."

Mr. Marley: I move that the words, "Her whole physical appearance was in perfect condition," be stricken out.

The Court: Sustained.

Mr. Marley: I think that other, "She walked and sat perfectly erect when she worked she used both hands very well when she was working for me," stay in, but the other is merely incompetent.

Mr. Wickersham (continues reading):

"A. Moved both hands very well; that was what I was getting at.

[fol. 367] Q. Did you observe her while she would be manipulating the machine?

A. Yes, I did.

Q. State with what speed and dexterity she operated it?

A. The fastest operator I had on my 10-weeks tour."

Mr. Marley: Move to strike that out.

The Court: Motion sustained.

Mr. Wickersham (continues reading):

"A. She completed the wave in an hour and ten minutes which is good time."

Mr. Marley: Object to that and move to strike it out.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State the average length of time required to complete a permanent wave?

A. Two hours.

Q. State how long it required Mrs. Johnson to do it in?

A. An hour and ten to twenty minutes.

Q. State if you observed her using her right hand?

A. I did.

Q. State with what speed she was able to use it.

A. A permanent wave depends solely on the right hand."

Mr. Marley: Move that whole answer be stricken out as not responsive to the question.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. State what hand is used in giving a permanent wave?

A. The right hand mostly is used most of the time.

Q. State what you observed—how you observed her using her right hand at that time?

A. Used it freely and she gripped the hair very strongly to wrap it around the curler.

Q. Did you observe her manipulating any musical instruments?

A. The piano.

Q. Anything else?

A. That is all I saw.

Q. Did you watch her play the piano?

A. Yes.

Q. Did you observe the movements of her right hand when she would be doing that?

A. Yes.

Q. What did you observe in regard to those movements?

A. That she played the piano very nicely.

Q. State whether or not you saw any apparent restricted motion of the right hand?

A. I did not.

[fol. 368] Q. State whether or not you heard any complaints from her of ill feeling, ill health?"

Mr. Marley: Objected to as incompetent.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. When did you see her after the 27th?

Mr. Marley: Fourth of July.

A. No, it wasn't the fourth of July; I left New York the fourth of July.

Q. When did you see her next?

A. Saw her at the San Francisco convention.

Q. What did she do there?

Mr. Marley: What year was that?

A. 1925.

Q. How long was that after this first time you saw her?

A. Five or six weeks, approximately that time.

Q. Five or six weeks, and where was it, San Francisco? Did you see her doing anything using her hands at San Francisco?

A. Yes; she was banner carrier for Kansas City for the convention.

Q. Did she manipulate any machines at San Francisco?

A. Permanent wave machine?

Q. Yes.

A. She gave one wave for us.

Q. What did you observe in the way she manipulated the machine?

A. She worked extremely hard there for she wanted to get a medal from Mr. Nestle."

Mr. Marley: Object to that answer.

Mr. Wickersham: Strike that out. (Goes on reading:)

"Q. How long did you observe her in San Francisco?

A. Approximately 10 days.

Q. Ten days. And then when did you next see her?

A. I saw her in New York about a month later.

Q. About a month later; what was her appearance in New York as to health and ability to get around?

A. It was perfect."

Mr. Marley: Object to that——

Mr. Wickersham: Strike it out. (Continues reading:)

"Q. Did you see any change in her?

[fol. 369] A. Yes, she looked a little bit better, making that trip through the northwest."

Mr. Marley: Move to strike out "Making that trip through the northwest," incompetent and not responsive to the question.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. Do you know what her business was in New York?

A. The purpose was to come back that way for new machines."

Mr. Marley: Move to strike it out.

The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. Where did you see her in New York?
A. At our office."

And then there is some discussion between the attorneys, that I won't read.

"Q. How long did you see her in New York?
A. I saw her about three times.
Q. How long was she in New York that you knew of?
A. I won't commit myself; I don't know exactly. Wasn't over a week; that I do know.
Q. Then when did you see her again?
A. I saw her again last Sunday.
Q. Last Sunday. What did you observe in regard to her appearance on that occasion?
A. When she talked to me I could not understand her; she sort of stuttered; the words were inaudible at times; I noticed she dragged her leg along as though she was crippled and I noticed she had become much thinner and that her hand,—that her right hand was moved along and that anything she wanted she just placed it on; she couldn't hold it; she couldn't grip it.
Q. Did you observe her manipulating any permanent wave machine?

Mr. Marley: This last Sunday?

A. Monday, I had her try our mechanical winder and she could not hold it. In trying to wrap the hair around with the mechanical winder and use her right hand she couldn't turn the winder around; she placed it and tried to pass it around; she couldn't grip it with her fingers.
[fol. 370] Q. You can't say she couldn't grip it.
A. She didn't move it with her fingers and the result was she didn't do it at all."

Mr. Marley: I move to strike out that latter part, beginning with "The result was——"
The Court: Sustained.

Mr. Wickersham (continues reading):

"Q. Did she manipulate the machine?
A. No, not the machine.

Q. Are you familiar with those machines?
A. Yes.
Q. Sell those machines?
A. Yes.
Q. You handle them?
A. All the time.
Q. How long have you done that?
A. Going on four years.
Q. Are they easy or hard to manipulate?
A. Simplest thing in the world.
Q. Now, have you observed her when you would be talking to her how she would talk and what her continuity of talk and speed was?

A. As a good example this morning, I got all balled up and didn't know where *to* me. I can't—at times when she talks to me over the telephone I can't very well hear it; that is, the words sort of jumble up, and I try to get what she tells me, but not to embarrass her I don't ask her to repeat the question for me."

Mr. Marley: I understand the Court sustained the objection to that.

The Court: That part "As a good example this morning, etc." is stricken out.

Mr. Wickersham (continues reading):

"Q. What have you noticed in regard to her speech when you would be talking to her face to face?

A. Face to face if I listen to her closely I could hear her, but if I was some distance away, about five or six or eight feet away I could not hear her so well.

Q. I want to ask you if you can hear or understand her?
A. Understand her.

Q. State what you noticed in regard to her continuity of speech and remaining on the same subject, if anything?

A. She would start talking on one subject and seem to forget it immediately and start talking about something else; I have noticed that on about eight different occasions.

[fol. 371] Mr. Marley: This last Sunday and Monday?

A. Last Sunday in her home. I also noticed, Mr. Chilcott——

Q. What else, if anything, did you notice?

A. She always used to sing, but I haven't heard her at any time utter one note."

Mr. Marley: I move to strike out that answer as incompetent, I don't——

The Court: All right, sustained.

Mr. Marley: I will not offer the cross-examination.

The Court: Call your next witness.

Mrs. Marleta McDaniels was thereupon called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chilcott:

Q. State your name, please.

A. Mrs. McDaniels.

Q Where do you live, Mrs. McDaniels?

A. 5700 Charlotte.

Q. Are you married or single?

A. Married.

Q. How long have you known Mrs. Myrtle Johnson?

A. About four years.

Q. Did you make a trip with Mrs. Johnson last summer to Battle Creek, Michigan?

A. Yes, sir.

Q. How did you go up there?

A. Drove in a car.

Q. Who drove the car?

A. I did.

Q. Whose car did you drive?

A. Her car.

Q. I beg your pardon; how long did you say you had known Mrs. Johnson?

A. About four years.

Q. Now, how often did you see her just prior to this trip she took to New York?

A. Prior to the trip?

Q Yes; how often did you see her?

A. Oh, I would see her on the average of once a week.

Q. What was her physical appearance?

A. Why, to me she appeared to be in the best of health.

Q. Did you see anything out of the ordinary with her?

A. I did not.

Q. About how much did she weigh?

A. I should judge she weighed about 155 or 160.

Q. Do you know with what regularity she attended her business?

A. Daily.

[fol. 372] Q. Now, what did you observe about her after she came back from that trip?

A. Why, her face appeared to be drawn to the left; her mouth and face.

Q. Yes.

A. She appeared to be unable to use her right limb the first time I saw her at all.

Q. Where was she the first time you saw her?

A. The hospital; Grace hospital.

Q. Do you know how long that was after she got back?

A. That was about six days.

Q. And what did you observe in regard to the use of her right arm?

A. It appeared to me that the arm was rather slow and sluggish of movement, and she seemed to not be able to grasp things.

Q. Now, did you have any talk with her on that occasion?

A. Why, I tried to talk with her. She seemed to be unable to articulate right.

Q. Now, how often did you see her from that time on?

A. I saw her at least once a week.

Q. At least once a week. I want you to state what progress she made toward recovery during that period of time that you observed.

A. I observed very little progress toward recovery.

Q. Over how long a period of time?

A. Well, in the last year and a half.

Q. Have you observed any progress the last eight or nine months?

A. I have not.

Q. State what you know in regard to her weight now as compared to what it was before she was injured.

A. Well, she is much underweight in comparison with her weight before her injury.

Q. What do you notice in regard to the way she carries herself and handles her right foot in walking?

A. It seems to be when she walks she walks with a dragging movement of the right foot, and it has a hitch.

Mr. Chilcott: That is all.

Mr. Marley: That is all.

(Witness excused.)

Mr. Marley: Wait. You are no relation to her at all, are you?

[fol. 373] Mrs. McDaniels: None whatever, no.

Mr. Chilcott: I have one more witness, a doctor, and he couldn't be here until 3 o'clock.

The Court: Take a recess for seven minutes.

(Which was accordingly done.)

Dr. Paul Martin Krall was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wickersham:

Q. Your full name, please, sir.

A. Dr. Paul Martin Krall.

Q. Are you regularly licensed and practicing physician of the state of Kansas?

A. I am.

Q. And how long, sir?

A. Since 1913.

Q. And are you connected in any way with St. Margaret's hospital?

A. I am.

Q. And were you in the summer of 1926?

A. I was.

Q. What capacity?

A. I am physician in chief to St. Margaret's hospital.

Q. Are you practicing in Missouri, also?

A. I am.

Q. Do you know Mrs. Myrtle Johnson, the plaintiff in this case?

A. I do.

Q. Were you called to attend or treat her in the summer of 1926?

A. I saw her in consultation with Dr. Hines, I think about May 12.

Q. And where was she?

A. At her home.

Q. And did you later have her taken to your hospital?

A. Yes, sir. I attended to her at St. Margaret's hospital from June 9 until July 10, I think.

Q. From the time you saw her and during the time you treated her, what was she suffering from that you treated her for?

A. Treated her for arsenical poisoning.

Q. And how long did she remain in your hospital?

A. From June 9 until July 10.

Q. And during that time did you make any blood test?

A. No, sir.

Q. The entire time she was under your observation and care, did you observe any evidence whatever of syphilis?

A. We did not.

[fol. 374] Q. Or neurosyphilis?

A. No, sir; not proven.

Q. Sir?

A. No proven evidence.

Q. And did you observe any—— What was the situation with reference to her right arm and leg?

A. She had a paralysis of her right arm and leg, simulating a condition such as we see in anybody that has a cerebral hemorrhage of the brain.

Q. Your business was merely the treating of the arsenical poisoning condition?

A. Yes, sir.

Q. And you did nothing more than that?

A. No, sir.

Mr. Wickersham: That is all.

Cross-examination.

By Mr. Marley:

Q. Now, Doctor, I believe you say you first saw her out at her home?

A. Yes, sir.

Q. And when you saw saw her there in what condition did you find her with reference to——

A. At the time when I saw her she had what was thought an eczematous eruption covering her whole body. That is, most of her skin was a sort of blister-like eruption part of them—some of them were ruptured and others were still existing as such, and part of the skin was crusted. Her hair was coming out and her general body surface was just a question of blisters that were not ruptured, those that were ruptured, and crusts.

Q. Well, now, did you ask her with reference—to whether or not any Wassermann tests had ever been taken or not?

A. I did.

Q. Didn't she tell you that they had been taken?

A. Yes, sir.

Q. Didn't she tell you they were positive?

A. No, sir, she said they were negative.

Q. Said they were negative?

A. Yes, sir.

Q. Not positive?

A. Yes, sir.

Q. How long did you treat her to get rid of this arsenical dermatitis that she had?

A. I saw her, I think it was about May 12 or 14—I am not sure about those two dates, either May 12 or 14 when I saw her in consulation with her physician, and she improved up to a certain point, when some indiscretion in her diet caused her a relapse; and at that time her physician called me up and insisted that I take charge of the case. I told him that if she would go to the hospital I would be very glad to work with him or otherwise; she would have to come to [fol. 375] St. Margaret's hospital, where I would see her practically every day.

Q. She went to St. Margaret's hospital then?

A. Yes, sir.

Q. Now, then, did you treat her there—how many times a day?

A. I saw her practically every day.

Q. What medicaments, if any, did you give her?

A. All local.

Q. All local?

A. All local, including ultra-violet.

Q. Now, you gave her a capsule later on, didn't you, some form of treatment in capsule form?

A. Yes, sir.

Q. What was in that?

A. That contained some thyroid extract.

Q. Some thyroid extract?

A. Yes, sir.

Q. Did you give her any bismuth at all?

A. At no time.

Q. Never did give her any bismuth?

A. Never.

Mr. Marley: I guess that is all, Doctor.

The Court: That is all, Doctor.

(Witness excused.)

Mr. Chilcott: The plaintiff rests.

Whereupon The Plaintiff Edward H. Johnson rested his case.

Whereupon the Plaintiff Myrtle J. Johnson rested her case.

MOTION FOR INSTRUCTED VERDICT AND OVERRULING OF SAME

The Court: Proceed with the defense.

Mr. Marley: To keep my record straight, your honor, I will ask your honor to instruct the juror in each instance to return a verdict for defendant. I have made on Myrtle Johnson and the other Edward Johnson.

The Court: The requested instructions are refused.

Mr. Marley: And exception in each instance separately noted.

The Court: Let the record so show.

Which said instruction numbered "A" so prayed by the defendant and which the court refused to give is in words and figures as follows, to-wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Edward H. Johnson cannot [fol. 376] recover in his action and your verdict must be for the defendant, New York Central Railroad Company."

And to the failure of the court to give said instruction so requested by defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, the defendant, by its counsel, then and there at the time duly excepted and still excepts.

Which said instruction numbered "B" so prayed by the defendant and which the court refused to give is in words and figures as follows, to-wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Myrtle J. Johnson cannot recover in her action and your verdict must be for the defendant, New York Central Railroad Company."

And to the failure of the court to give said instruction so requested by defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, the defendant, by its counsel, then and there at the time duly excepted and still excepts.

And Thereupon the Defendant to maintain the issues on its behalf offered and introduced the following evidence, both oral and documentary in words and figures, as follows, to-wit:

Doctor I. D. Siminson was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Just give your name to the court and jury, please?
A. I. D. Siminson.
Q. Where do you reside, Mr. Siminson?
A. Chicago.
Q. In the state of Illinois?
A. Yes, sir.

Q. Are you in any way connected with the New York Central Railroad Company?

A. I am.

Q. Do you recall the circumstances on the 28th day of September, 1925, at about the hour of or during the afternoon of examining Myrtle Johnson, this lady here, with reference to an injury to the head?

A. I do.

Q. Now state to the jury just what examination you made, and what, if anything, you found.

[fol. 377] A. I first found the young lady in a berth, lower berth, and I made an examination in the berth but I had her taken to the station, to the ladies' room, where I could have better light. We there put her on the sofa and I made an examination of her head where she stated that she had received a blow, and I questioned her slightly; didn't go into it very fully. I examined her, went over some of the reflexes, and that is practically the examination; what the examination consisted of.

Q. Now, in examining her head where she said she was hurt, what, if anything, did you find in the way of a lump or anything?

A. I found no lump at that time.

Q. Tell the jury what kind of an examination you made.

A. I made the examination by parting the hair and looking over the area of the head which she stated—the place which she stated had been struck; went over—in separating the hair, went over the area very carefully. At that time I found no mark of injury.

Q. Did you find any lump at all?

A. I did not.

Q. Did you find any discoloration whatever?

A. I did not.

Q. Did you find any broken skin at all?

A. I did not.

Q. Now, you say you asked her some questions and spoke to her. What did she say to you about her condition, if anything?

A. She stated that prior to this she had had an attack of double vision; that was the only bearing that I could put on her case at that time. She stated that there was times that

she had had double vision. I asked her if it was a blurred vision. She said, No, it was a double vision.

Q. Did she complain of any pains anywhere other than the fact that she had been hit on the left side of the head?

A. She never complained of pain, but she complained of a numbness in her hands and legs; tingling sensation.

Q. What did she say to you about how she happened to hurt herself?

A. She stated that she was trying to—getting ready to retire and in going over her suitcase to get out some garments she was going to put the suitcase under the berth, and in reaching she struck her head upon the lower part of the upper berth.

Q. You didn't give her any treatment, did you?

[fol. 378] A. I didn't give treatment at that time, because I felt that no treatment that I could give her would be of any benefit. It appeared to me more of a hysterical nature.

Q. I will ask you if another doctor that you knew examined her there at that time, or about that time?

A. Yes, sir.

Q. Who was he?

A. Dr. F. E. Pierce, chief surgeon of the road.

Q. Where is he now?

A. Some place in California. I couldn't say just where.

Mr. Marley: Well, you may cross-examine.

Cross-examination.

By Mr. Wickersham:

Q. How old are you, Doctor?

A. Twenty five years old.

Q. How long have you been practicing your profession?

A. About five years.

Q. What school are you a graduate of?

A. Rush Medical School, Chicago.

Q. What position do you occupy with this railroad company?

A. Company surgeon.

Q. For all of Chicago?

A. I beg pardon?

Q. For all of Chicago?

Q. What do you mean by "all of Chicago"?

Q. Just what I said.

A. For the company at Chicago, yes.

Q. That is what I meant; for the company at Chicago.

A. Yes.

Q. Are you the only one?

A. No.

Q. How many are there?

A. For the New York Central proper there is the chief surgeon and myself.

Q. Are you in his office?

A. I am.

Q. You were in Pierce's office at the time?

A. I was; yes, sir.

Q. How long had you been?

A. I had been there about a little over a year, year and a half. About a year.

Q. Is he still connected with the New York Central?

A. He is.

Q. And has been ever since this accident?

A. He has.

Q. And he is out in California somewhere?

A. Yes, sir.

[fol. 379] Q. How long has he been out there?

A. He left on the 13th of this month.

Q. Anybody with this lady?

A. There was another young lady with her; yes, sir.

Q. You said that you talked at that time with Mrs. Johnson herself.

A. With the patient herself; yes, sir.

Q. How did she talk, all right?

A. No, she didn't She talked—she had been crying and she talked between sobs.

Q. And you talked to her very little. "Very slightly" in your language.

A. I didn't say slightly. I said I went into her history slightly.

Q. You said you questioner her slightly.

A. Slightly, but I didn't talk to her slightly.

Q. Who was present when you questioned her slightly?

A. Another young lady and Dr. Pierce.

Q. Who examined her? Did you examine her before Pierce did?

A. I did.

Q. Then he examined her afterwards?

A. He did.

Q. Anybody else present besides Mrs. Johnson and the lady that was with her and Pierce and you?

A. Well, there was—the matron at the station was present, she was standing there.

Q. Do you know her name?

A. No. There were several people around. I don't know who they were; probably passengers.

Q. Did you talk at all with the lady who was with Mrs. Johnson?

A. Yes.

Q. Did you talk to her about how this accident happened?

A. Yes. I think she volunteered the information.

Q. The truth is that what information you got was gotten from the young lady who was with Mrs. Johnson?

A. Part of it.

Q. Most of it, wasn't it?

A. No, I wouldn't say most of it.

Q. Well, wasn't the truth that this woman was paralyzed on her right side?

A. She wasn't at that time, no, sir.

Q. Oh, wasn't paralyzed?

A. No, sir.

Q. Why did you have her carried?

A. Because she claimed that she couldn't walk.

Q. Well, wasn't that true, according to your idea?

A. No, it wasn't because when the red cap brought her to the couch the chair was pushed to one side, and with sup- [fol. 380] port she moved her legs and she moved her legs as we—Dr. Pierce raised the limb and told her to extend the limb. She moved her hands.

Q. Well, now, so we won't misunderstand each other, you want us to understand that there wasn't any partial paralysis, even, of the right leg and arm?

A. Well, I don't believe there was a partial paralysis, no.

Q. Well, how much was it paralyzed? Just tell the jury?

A. Well, as far as moving the leg, the young lady moved her leg. I won't term it paralysis at all at that time.

Q. What do you call it, hemiplegia?

A. Wouldn't call it hemiplegia.

Q. Well, was it partial paralysis?

A. No, I think it was a sort of hysteria.

Q. Oh.

A. Where she voluntarily wouldn't move the limb, when she was to walk. When she was lying on the sofa she put the limb up, flexed the limb; she extended the limb.

Q. I see. It was a state of hysteria; she voluntarily wouldn't move her right side?

A. When she was walking. She said she couldn't stand.

Q. Was she voluntarily moving her left side?

A. When we asked her to raise the limb she did. She just didn't lie there and move them, but when we asked her to move the limb she did; yes, sir.

Q. Well, if it was hysteria would there be any difference in the use of one side of the body than the other?

A. There was no difference.

Q. Oh, there wasn't any. This women could use her right leg as good as she could the left one, according to you?

A. Yes, sir, she did at that time.

Q. Her right arm as good as she could the left one?

A. She complained of a numbness, and she held the left hand in a sort of a crow-foot position of the hand.

Q. Oh, that was the left hand?

A. The left hand; yes, sir.

Q. And did she have a crow-foot position with the right one, too?

A. She did not.

Q. So that you gathered, then, that she was complaining more of her left than her right side?

A. That is what he was; yes, sir.

Q. Of the left than the right?

A. Yes, sir.

Q. At that time.

A. Yes, sir.

Q. Well, did you have an idea there was a partial paralysis of both sides, then?

[fol. 381] A. Didn't have an idea there was a paralysis of either side.

Q. Well, didn't you say a moment ago that you thought it wasn't all total paralysis but kind of a partial paralysis?

A. Due to hysteria; yes, sir.

Q. Well, then, whatever it was due to, it was there, wasn't it?

A. I don't know whether it was or not.

Q. Well, you just got through saying that it was due to hysteria. Well, if it was due to something it was there and existing, wasn't it; the paralysis?

A. Just the—she said she couldn't walk.

Q. But you had an idea it was due to hysteria, that paralysis?

A. I did.

Q. And if you had the idea that paralysis was due to hysteria, you had an idea there was paralysis, didn't you?

A. No, sir, I didn't think it was paralysis.

Mr. Wickersham: Oh, I think that is all.

The Court: Call your next witness.

Mr. Marley: Just a minute.

Redirect examination.

By Mr. Marley:

Q. Now, speaking of this paralysis due to hysteria, if paralysis is due to hysteria is that a real or imaginary paralysis.

A. It is imaginary paralysis.

Q. That is, it is a mental state of the person?

A. Mental state of the patent.

Q. Rather than a physical condition?

A. Exactly.

Mr. Marley: That is all.

Mr. Wickersham: That is all, Doctor.

(Witness excused.)

Albert S. Kates was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Please give your full name to the jury, Kates.

A. Albert S. Kates.

Q. Where do you reside?

A. Brooklyn.

Q. Where?

[fol. 382] A. 884 Green avenue, Brooklyn, New York.

Q. Brooklyn, New York. How long have you resided in Brooklyn?

A. About two years.

Q. What employment are you in?

A. Pullman porter.

Q. On what road; for what company?

A. Pullman company.

Q. And on what road?

A. New York Central.

Q. As such, of what kind of a car do you have charge?

A. They vary. You see we alternate.

Q. You don't have any particular kind of a car, then; you alternate?

A. Yes.

Q. Well, do you remember the circumstances of having or being in charge of a club car on train 19 of the New York Central leaving New York City on the evening of September 27, 1925, when two young ladies went into the club car?

A. No, I wasn't the club car porter.

Q. You were the Pullman porter?

A. I was in charge of the car they were occupants of.

Q. How is that?

A. I wasn't the club car porter.

Q. You were not?

A. They were passengers in the car that I was assigned to.

Q. Well, what car were you in charge of, do you remember?

The Court: He says the one in which they were passengers.

Mr. Marley: Oh, yes.

Q. Well, do you remember the circumstances of their coming on board the train and your car at Harmon, New York, on that evening?

A. The circumstances?

Q. Do you remember that they did come on?

A. Oh, yes.

Q. Now, then, just state to the jury what you saw them do when they got on the car; what did they do?

A. Well, after getting on the car they went immediately to the diner or the club car, and after leaving the diner they went forward to the club car, which is the head car; the club smoker.

Q. Now, did you see them in the club car that evening, then, from that time on?

A. On a couple of occasions I did; yes, sir.

Q. Yes. Did you—state whether or not you put in their grips in their berth for them, in their seat, or did they put it in themselves?

A. I think I did.

Q. That is your recollection?

[fol. 383] A. I can't recall definitely.

Q. Now, when you saw them in the club car what did you see them doing?

A. They were sitting there with two gentlemen in the corner, playing cards, I think.

Q. Playing cards?

A. Yes, sir.

Q. How late in the evening was it the last time you saw them playing cards?

A. It was about—let me see. I should say around 12 o'clock.

Q. Twelve o'clock at night?

A. Yes, sir.

Q. When you saw them at that time there were there any other persons than these four in the club car, or how many people were in the club car at that time?

A. Well, I couldn't recall that.

Q. You couldn't recall that. Well, when they were playing cards there did you see the men smoke?

A. I did.

Q. Did you see anybody else smoke?

A. Well, I can't say that I seen anyone else smoke, definitely.

Q. Now, did you see them leave that club car and go to their sleeper?

A. No, I didn't.

Q. You didn't. Do you recall on that trip at about that time, anywhere from 11 o'clock in the evening until 12

o'clock midnight, of any unusual jerk or jar of the train or of the sleeping car in which they had a berth?

A. No, sir.

Q. Was there any unusual jar that evening?

A. No, sir, not to my knowledge.

Mr. Wickersham: Just a minute. If he don't recall that——

Mr. Marley: He says not to his knowledge. That is competent.

Q. Now, did you speak—do you remember of a conversation with her the next day?

The Court: Conversation with whom, Mr. Marley?

Mr. Marley: With Myrtle J. Johnson.

A. No, sir, I didn't have any.

Q. Do you remember of her——

A. Oh, just a minute. Just a minute.

Q. Do you remember at any time on that trip of her making any statement to you as to how——

[fol. 384] Mr. Wickersham: Wait a minute. He said he didn't have any.

Mr. Marley: Wait a minute. That was on that evening.

Mr. Wickersham: No, the witness has stated he didn't have any conversation.

The Court: He immediately corrected himself and said he did recall. Counsel didn't hear him.

The Witness: Proceed?

By Mr. Marley:

Q. What did she say to you about bumping her head, if anything?

A. Well, about 12 o'clock to 12:30 she told me to get the conductor, that her sister was sick.

Mr. Wickersham: Who is this conversation with?

Mr. Marley: That is Imogene.

The Court: Yes. That is not responsive.

By Mr. Marley:

Q. Was that 12 or 12:30 the next day?

A. It was around 12 or 12:30.

Q. The next day?

A. The next day.

Q. Did you have any conversation with Myrtle Johnson, the one that did bump her head?

A. None whatever; no, sir.

Q. None whatever. Well, did you get the conductor to go see her?

A. I did.

Q. But that was about noon the next day?

A. Yes, sir.

Mr. Marley: Now, I guess that is all. You may cross-examine.

Mr. Wickersham: No questions.

(Witness excused.)

The Court: Call the next witness.

Mr. Marley: All right. Just a minute, your honor.

Emmy Matthews was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

[fol. 385] Direct examination.

By Mr. Marley:

Q. Just state your name to the stenographer and the jury and the court.

A. Emmy Matthews.

Q. Where do you reside, Emmy?

A. Jersey City Heights.

Q. And how long have you resided there?

A. Fourteen years.

Q. Have you any position with the Pullman Palace Car Company?

A. Yes, sir, I am maid on the Pullman Palace Car Company.

A Juror: We can't hear.

The Court: Speak just a little louder.

The Witness: I said I was maid on the Pullman Company's car.

By Mr. Marley:

Q. Are you maid on one of the club cars?

A. No, sir, I am not on the club car. I am on the whole train.

Q. Just on the whole train?

A. Yes, sir.

Q. Do you remember being maid on the train on which Myrtle Johnson and her sister-in-law, Imogene, got on at Harmon, New York, on the evening of September 27, 1925?

A. Yes, sir, I remember them. I was maid on there.

Q. Do you remember seeing them get on the train?

A. Yes, sir, I did.

Q. Just describe to the jury what you saw them do when they got on the train.

A. They got on the train, the porter put their bags in the car, and they went straight from the seat to the club car. They didn't stay in the train, and the porter asked me, "Did you see where the two ladies went?"

Mr. Wickersham: Just a minute.

The Court: Don't tell what he said.

By Mr. Marley:

Q. When did you next see them, and where?

A. Sitting in the club car.

Q. About how long after that was it?

[fol. 386] A. Quite a while. It was after dinner.

Q. After dinner.

A. And during dinner, too, I saw them there.

Q. Now, then, when you saw them in the club car what did you see them doing?

A. They were smoking cigarettes and drinking lemonade, with two gentlemen.

Q. And were they playing cards?

A. Yes, sir.

Q. Now, how often did you see them while they were in the club car that evening?

A. I saw them quite a bit, because I kept waiting for them to go to bed. I can't clean up my wash rooms until every one is to bed, and I generally go to bed along about Utica; but this night I went at Syracuse. Pulling into

Syracuse I was getting my bag and I met them coming out of the car.

Q. Do you remember about what time of the night that was?

A. That was 12:20 or 12:30.

Q. In the night?

A. Yes, sir.

Q. Now, then, when you saw them state whether or not they were talking and laughing with each other.

Mr. Wickersham: Don't lead her.

The Witness: What did you say, sir?

Mr. Marley: How is that?

The Witness: I beg your pardon.

Mr. Marley: Just read the question.

(Question read as above recorded.)

A. Yes, they were talking and laughing with each other, and there was a gentleman with them, and they went on through, because they were in the head car from me. They were in 64. One of the ladies looked at me and smiled, and the other one gave me a hard look.

Q. When they got to their car did you see them there?

A. No, sir, I never saw them any more until the next day.

Q. The next day. Now, during that night, or during those hours that they were going to the sleeper, car 64, do you recall of any sudden jerk or jar or lurch of the train or car?

A. No, sir, no, sir; because we wasn't running fast. We were pulling into Syracuse and we go through the city there right through the main streets; and they were on their way to bed then. They were on their way to their car, 64, then, and there wasn't any jerk and there wasn't any pulls, because I never went to bed until leaving Syracuse.

[fol. 387] Q. Now, then, when did you see them the next day?

A. I saw them the next day around about lunch time.

Q. And when you saw them did you talk to Myrtle Johnson, the lady here in black?

A. Yes, sir, I did, because Mr. Vernon, the conductor, told me I had better go and call 64—I don't remember the berth—the lady was sick, and see what I could do for her;

so I went there and offered her my assistance, and she was trying to drink a bowl of soup and a cup of tea, and she was very sick and nervous and was crying. I tried to pacify her. When I saw her she couldn't raise the soup to her mouth. I asked her did she want me to give it to her. She seemed nervous, because she didn't know what had happened to her.

Mr. Wickersham: Just a minute. I move to strike out "she didn't know what had happened to her."

The Court: Stricken out.

Mr. Marley: That is all right, I consent to it, your honor.

Q. Now, then, did you discuss with her the next day before you got to Chicago and while she was in the wash room anything about how she was injured?

A. Yes, sir. She told me when I went to the berth that she was laughing playing with her sister, talking, and she went to climb over her sister and struck her head on the top of the berth; says "wonder if that could have hurt me"; says, "Then when I went to get up this morning I couldn't raise my head from the pillow," and I told her I thought it was a little nervous attack, and in fact I told her I thought it was a bilious attack, because she told me in the wash room after that she had never had any spells, but she was in a store a few days previous to that and got a dizzy spell and had to come out of the store; didn't know what had happened to her. She says, "I never have spells."

Q. Did you tell her you thought she had a bilious attack?

A. Yes, sir, I did.

Q. I believe you say there was no rough handling or jarring of the car or of the train that night?

A. No, sir.

Q. Now, speaking about smoking cigarettes, did you observe them smoking for any length of time?

A. No, sir, I couldn't say that I did; but every time I went there they was smoking, because I never stayed in there any length of time.

Mr. Marley: You may cross-examine.

[fol. 388] Cross-examination.

By Mr. Wickersham:

Q. Where was the diner on this train?

A. The diner on the train is always on the rear end, sir.

Q. Was it on the rear of this train?

A. Yes, sir.

Q. Where was the car that they occupied with reference to the diner?

A. It was the head car or the second car from the head, I don't know, because 64 as always head, and they sometimes have five or six or seven cars, maybe eight or nine, from the diner.

Q. Now, the car they occupied——

A. Was a head car.

Q. Was it nearest to the engine?

A. Yes, sir.

Q. Where was this club car?

A. That is the head car, sir.

Q. Sir?

A. That is the head car.

Q. That is the car nearest to the engine?

A. Yes, sir. That is the engine, baggage cars, and then the club car.

Q. Then the car they occupied wasn't nearest to the engine?

A. No, sir.

Q. Where was it?

A. Well, I should judge it was the third or fourth car from the engine. I couldn't just say that, sir, because I don't know whether it was the second car from the head or the first car from the head.

Q. How many cars were there between the car in which they had their berth and the club car?

A. I couldn't say that exact, sir. I don't know whether it was one or two, whether they were the head car or whether there was one in between.

Q. You don't know whether they were the head car?

A. Whether they were in the head car I don't know; whether the ladies were in the head car or whether they was in the car back of the head car.

Q. How many cars were there between the car in which they had their berth and the dining car?

A. I can't say that, sir.

Q. What is your best recollection.

A. I couldn't say, sir. Sometimes the train carries nine cars, sometimes twelve, sometimes fourteen.

Q. Why, you were answering questions here about your remembrance of whether there was a jerk of the train.

A. That isn't a case of remembrance, sir. I don't know how many cars each train carries.

[fol. 389] Q. Oh, that isn't a case of remembrance?

A. I can remember what happened on the train I was in.

Q. Could you walk from the club car back to the dining car?

A. Certainly you can walk, sir.

Q. Did you?

A. Did I walk it?

Q. Yes.

A. When, sir?

Q. What?

A. Did I walk it when?

Q. That night.

A. I walked it several times that night.

Q. Well, I want to know how many cars, if any——

A. I couldn't tell you, sir, because I don't know just how many. Perhaps you can get the conductor that could tell you how many cars were on the train.

Q. I am trying to find out what you know.

A. I can't tell you what I don't know, sir.

Q. How many sleepers were in that train?

A. I couldn't tell you. I don't know.

Q. You think there was two, or five?

A. I know there was more than two, and I know there was more than five, but just how many I can't tell you.

Q. Well, I am trying to find out——

The Court: You have asked that several times. Don't ask any more. She said she didn't know.

By Mr. Wickersham:

Q. Well, I want to know——

A. You couldn't know from me, sir, because I don't know.

Q. You don't know what I am going to ask you, madam. I want to know whether or not there was more than one car, in your recollection, between the car in which their berth was and the diner. Do you have any idea?

A. Yes, sir. There was several.

Q. Several. That is what I want to know.

A. But just how many I couldn't tell you.

Q. Now, then, you testified that you observed them get on that train.

A. Yes, sir, I saw them get on.

Q. And when they put the grips, had the grips put down there in the berth, that they went immediately to the club car.

A. They went to the club car.

Q. And you saw them in the club car from time to time thereafter.

A. I did, because I went to look.

Q. I didn't ask you about "because."

A. Well, I can tell you.

Q. And they remained there, didn't they?

A. I couldn't say they remained there all along, sir. They may have went to the diner. I don't know. I couldn't say [fol. 380] they sat from the time they got on the train until the time they went to bed, sir. I wouldn't dare say that, because I couldn't.

Q. Where were you supposed to be on that train?

A. All over the train, from the club car back.

Q. Well, do you have any place on the train where you kept any appliances or materials, what you would call your station?

A. Yes, sir, I do in 1927; I keep my grip.

Q. Where was that on this particular train?

A. Well, it is wherever they make it up in the yards. Sometimes it is the head train, sometimes it is next to the rear train.

Q. I am not asking you about sometimes. I am asking about on this particular train, about where in that train did you have your headquarters?

A. Well, I had my headquarters about a couple of cars behind them; behind 64.

Q. That would be near the diner.

A. Yes, sir, near the rear.

Q. Yes. Did you notice anybody else up in that club car?

A. I noticed them up there with two gents playing cards.

Q. How many times do you think that you went up there that night to that club car and saw those two ladies?

A. About five times, because I was waiting for them to go to bed.

Q. Well, was that five times toward the end of the evening?

A. Yes, sir, five times towards the end of the evening; towards bed time.

Q. Did you talk with them about it?

A. No, sir, I didn't talk with them at all.

Q. And you also testified that they left the club car and went ahead to their car, is that correct?

A. No, sir, they couldn't have gone ahead. The club car is the head car of the train.

Q. That is just what I thought couldn't be true. You didn't mean that when you testified to that, did you?

A. Didn't mean what, sir?

Q. That when they left the club car they went ahead to their car.

A. No, sir, not after they—the club car is the head car on the train. They would have to come back to their car.

Q. Yes. Now, are you real clear that the next day you saw a bowl of soup served to this woman?

[fol. 391] A. No, sir, I didn't see it served to the woman, but I saw the woman trying to eat the soup, drink the soup, when I went to her and she was nervous and crying.

Q. You say a bowl of soup?

A. It was a cup of soup. I wouldn't just say it was a bowl. It was a cup of soup, whatever they serve it in on the diner.

Q. Now, you say that when she was in that berth you had a talk with her.

A. I did, sir.

Q. And that you said to her that you thought it was perhaps a bilious spell.

A. Yes, sir.

Q. Because she told you later that she had had a dizzy spell?

A. No, sir, I didn't say that.

Q. You didn't say that?

A. I didn't say I thought it was a bilious spell because she told me later she had—I said I told her I thought she was bilious, and she was quite nervous and was crying. I said, "I wouldn't cry; I don't think there is anything; just nothing; you have got a bilious attack"; and later on, when

I was in the wash room with her, she told me about this dizzy attack in the store.

Q. I am talking about this time, now. Here is a woman that you go to see the next day along about noon, and she is crying and hysterical, and it occurs to you that she has got a bilious attack; hasn't had any talk with you before that——

Mr. Marley: Now, if your honor please, I object to that. She hasn't so testified, and he is trying to put words into her mouth.

The Court: Well, I haven't heard all of his question yet.

By Mr. Wickersham:

Q. What made you think she had a bilious attack at that time?

A. Because she——

Q. Wait a minute. From the fact that the woman was hysterical?

A. Because I felt the lady's stomach and it seemed terribly hard, and she had been drinking lemonade all night. It certainly will make you bilious.

Q. Oh, that will. Will that paralyze you, drinking lemonade?

A. It might. I don't know.

Q. Oh, you think it might?

A. I am not a doctor.

Mr. Wickersham: I think that is enough. That is all. [fol. 392] The Court: That is all.

(Witness excused.)

Martin Kane was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Now, just state your name to the court and jury, Mr. Kane.

A. Martin J. Kane.

Q. Where do you reside, Mr. Kane?
A. Buffalo.
Q. Where?
A. Buffalo.
Q. Buffalo, New York?
A. Yes, sir.
Q. What is your employment?
A. New York Central passenger conductor.
Q. How long have you been a passenger conductor on the New York Central?

The Court: Speak just a little louder. These gentlemen can't hear you. Turn and talk to them.
Mr. Marley: Yes.

Q. How long have you been a passenger conductor on the New York Central?
A. Twenty-six years.
Q. How long have you been in the employment of the New York Central?
A. Forty-one.
Q. How much?
A. Forty-one years.
Q. Forty-one years. Did you have charge of train No. 19 out of New York City on the evening of September 27, 1925?
A. I did.
Q. Do you remember of having two passengers in lower 8 of Pullman car No. 64 on that train from Harmon, New York, to Chicago?
A. That was the record of the passengers; yes, sir.
Q. Now, do you remember the circumstances of one of the parties, Myrtle Johnson, claiming to have bumped her head and being sick because of it?
A. Well, I didn't know anything about that until it was called to my attention.
Q. When was it called to your attention, Mr. Kane?
A. Why, the claim department at Buffalo called me up to find out about it, and I knew nothing of it.
Q. You never heard of it until that time?
[fol. 393] A. Not until then.
Q. Now, do you recall any unusual jerk or jar of your train on that trip between Harmon, New York, and Buffalo, New York?

A. I do not.

Q. Was there any unusual jar or anything on that trip?

A. Not any. There isn't any record on paper of a jar or jerk.

Q. Now, then, in running from Utica to Schenectady, what distance is that; about how far?

A. Schenectady to Utica?

Q. Yes.

A. 78 miles.

Q. Now, when you left Utica coming west, was your train on time that night?

A. We was four minutes late out of Albany and four minutes late out of Syracuse. We just made our time.

Q. So that you just made your time and didn't increase your loss of time.

A. No, sir.

Q. So that you were four minutes late at Albany and four minutes late at Syracuse.

A. Yes, sir.

Q. How were you when you got to Buffalo?

A. Four minutes late.

Q. At Buffalo?

A. Yes, sir.

Mr. Marley: Now you may cross-examine.

Cross-examination.

By Mr. Wickersham:

Q. How long after the 27th of September, 1925, was it that the claim department called your attention to this?

A. I couldn't give you that date, because the paper that was made out was dated September, 1927.

Q. September, 1927?

A. I couldn't give you that date. I haven't got it.

Q. What do you mean by saying "September, 1927"?

A. 1925.

Q. I am trying to find out now—you said that the first that your attention was called to this was by the claim department from Buffalo.

A. I haven't got the record of that date.

Q. I didn't ask you for the record. I am asking you about when it was that that request for information was made of you.

A. Well, it was a couple of months, at least.

Q. You were the conductor of the train itself; you were not Pullman conductor?

A. No, sir.

Q. Is it part of your position when people are hurt or sick on your train, where a doctor is needed, to do the wiring ahead for any doctor, if necessary?

[fol. 394] A. If it is made known.

Q. Yes, if it is made known that is part of your business.

A. Yes, sir.

Q. And it isn't a part of the business of the Pullman conductor; it is the conductor of the train?

A. Well, he would necessarily have furnished me with it.

Q. Tell you. In other words, the ordinary course of business——

A. Yes, sir.

Q. —if there is somebody that has been hurt or sick in a Pullman car, and it is deemed necessary to have a physician ahead somewhere, it is the course of business for the Pullman conductor or porter to report it to you?

A. Yes, sir.

Q. And you do the wiring?

A. Yes, sir.

Q. That is the regular way of doing things?

A. That is the regulation.

Mr. Wickersham: I think that is all.

Mr. Marley: That is all.

(Witness excused.)

John B. McCormick was thereupon called as witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Just state your name to the jury, Mr. McCormick.

A. John B. McCormick.

Q. Where do you reside?

A. Canandaigua, New York.

Q. And what is your business?

A. Railroad brakeman.

Q. On what road?

A. New York Central.

Q. How long have you been employed by the New York Central?

A. Forty three years.

Q. And do you recall that you were the brakeman on train 19 out of New York City on September 27, 1925?

A. Yes, sir.

Q. What was your run; from New York City to what place?

A. To Buffalo; Clinton Street, Buffalo.

Q. What part of the train is your station?

A. The rear man.

Q. You are the rear flagman, are you?

A. Flagman; yes, sir.

Q. Now, do you know about what was the rate in miles per hour of that train from Utica, New York, to Schenectady and Syracuse?

A. Well——

[fol. 395] Q. Approximately?

A. About, I would say about 40 miles an hour.

Q. Forty miles an hour?

A. Yes, sir.

Q. Now, do you recall on that night of any unusual surge, lurch or jolt of that train, going from Harmon, New York, to Syracuse, New York?

A. No, sir, I don't.

Q. Was there any such a lurch, jolt or jerk?

A. No, sir; I don't remember of anything.

Q. You didn't know anything about Mrs. Johnson here, being bumped in any way?

A. No, sir; I didn't.

Cross-examination.

By Mr. Wickersham:

Q. Mr. McCormick, any lurch or jerk or sudden stopping of the train on that track going 40 miles an hour, approxi-

mately, that would be sufficient to throw a woman who might be standing in the aisle and holding a curtain of the berth quickly around and throw her head against the berth and down to the floor is an unusual thing, isn't it?

Mr. Marley: I object to that, your honor. Read the question.

(Question read as above recorded.)

The Court: Objection sustained.

Mr. Wickersham: Exception to the ruling.

To which action and ruling of the court the plaintiff Myrtle J. Johnson, by her counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the plaintiff Edward H. Johnson by his counsel then and there at the time duly excepted and still excepts.

By Mr. Wickersham:

Q. You have been railroading a long while, and I will ask you if a person is standing in the aisle of a Pullman car, the train going toward the west, and there is a sudden stopping of the train, if it wouldn't throw a person toward the front of the train?

Mr. Marley: I object to that, your honor, as incompetent.

The Court: Overruled. You are asking merely as to the direction that the force would take under those circumstances.

Mr. Marley: Note an exception there.

[fol. 396] To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, then and there, by its counsel, at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

The Witness: Shall I answer?

The Court: You may answer the question, sir.

The Witness: I would like to have you repeat it.

(Question read as above recorded.)

A. Well——

Mr. Marley: There is no evidence, your honor, of a sudden stopping of the train.

Mr. Wickersham: Oh, that is just plain common sense, isn't it, Mr. McCormick?

A. There is stops that can be made, a sudden stop that wouldn't throw a person off their feet, I don't think.

The Court: No, the question is if it did throw them what direction would it throw them.

A. Well, it would naturally, of course, unless there was a jar this way and then a jar back, it would throw them towards the forward end of the train.

By Mr. Wickersham:

Q. I have asked you just a simple, plain question.

A. Yes, sir.

Q. If the train suddenly decreases its speed, stops, a person standing in the aisle, if it wouldn't have a tendency to throw the person toward the front of the train.

A. Well, I will tell you, Mister: I have seen them go forward and I have seen them go backward.

Q. Well, I am just trying to find out from you, if you will frankly tell me, if the physical force wouldn't throw you toward the front of the train under those circumstances. Now, wouldn't it?

A. Well, only—I am answering to the best of my ability. I say I saw them go forward and I have saw them go backward.

[fol. 397] Mr. Wickersham: If that is your ability that is all I have to ask you.

Redirect examination.

By Mr. Marley:

Q. Now, on that point, with reference to forward and backward, when the car is checked by the application of air by the engineer the air is elastic, is it not?

A. Yes, sir.

Q. And that puts a check first, and that throws you forward, doesn't it?

A. That is just what I mean exactly.

Q. Then the response of the elasticity jerks the car and puts you back again?

A. Yes, sir, that is just what I mean.

Mr. Wickersham: Don't lead him.

Mr. Marley: You didn't lead a bit.

Mr. Wickersham: I have a right to lead on cross-examination.

Mr. Marley: I mean in your own case. That is all.

Mr. Wickersham: That is all.

(Witness excused.)

Jerome S. Connors was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Just give your name to the jury, sir.
A. Jerome S. Connors.
Q. Where do you reside?
A. 11 Galloway street, Buffalo, New York.
Q. How long have you resided in Buffalo?
A. All my life.
Q. How old are you now?
A. Sixty-five.
Q. Where are you employed?
A. New York Central.
Q. How long have you been employed by them?
A. Forty-five years.
Q. What position do you have now?
A. Passenger brakeman.
Q. On that road?
A. On that road.
Q. How long have you held that position?
A. Thirty-five or six years.

Q. Thirty-five or six years?

A. Yes.

Q. Do you remember of coming out of New York City on train 19 on the evening of September 27, 1925?

[fol. 398] A. Yes, sir.

Q. And your run was from New York City to Buffalo, was it?

A. Yes, sir.

Q. Now, what is the speed of that train running at its regular rate from Oneida, New York, to Syracuse or Buffalo?

A. Why, the speed at that time was about 40 minutes from Oneida to—I think we are due at Oneida at 62——

Q. How many miles an hour, is what I mean.

A. Oh, sometimes maybe 40, 45, sometimes 50, sometimes maybe 60.

Q. According to whether they are running——

A. According to if we are right on time, why it is slow, and if we are a little late they run a little faster.

Q. Do you remember of this particular trip from New York City to Buffalo of any unusual lurch, jerk or jar of that train?

A. No, sir.

Q. Was there any such unusual jerk?

A. No, sir.

Q. Was there any jerk or jar or lurch on that train at that time that you noticed at all?

A. No, sir.

Q. Of course, you knew nothing about the accident?

A. Know nothing at all about the accident; no, sir.

Mr. Marley: You may cross-examine.

Cross-examination.

By Mr. Wickersham:

Q. When was your attention first called to this case?

A. Why, when I called at the claim department.

Q. When was that?

A. Well, I couldn't give you the day and date.

Q. This year sometime?

A. Oh, no. Along quite awhile ago. I couldn't remember. 1925 or '26, because we were ordered to go to the

claim department at Buffalo and make a statement in regard to this accident.

Q. You can't remember whether it was 1925 or 1926?

A. Didn't pay no attention to them at all, because we have got so many of them we don't keep a file or a record of them at all.

Q. And you have no recollection at all?

A. No, sir.

Q. Of anything that happened this night?

A. No, sir.

Q. Not the slightest?

A. Not a thing. Not the slightest; no, sir.

Q. And you don't know what happened the next night, or any other night?

A. No, sir, just the nights we were on the run I know if we were on the road everything was O. K.

[fol. 399] Q. I understand, but I just want to make it clear that when this claim agent, whoever it was, called you in either 1925 or 1926, you can't say which——

A. No, I can't.

Q. —you hadn't any idea about September 27, 1925, at all?

A. Didn't know anything about it, about the accident, at all; never heard anything at all about it.

Mr. Wickersham: Know nothing. That is all.

Mr. Marley: That is all——

Q. Now, with reference to that, on this particular trip where was your station? What car was it in?

A. Well, I am either at the head of the club car or one or two cars back of it, and I most always patrol the train about every 20 or 25 minutes from one end of the train to the other to see if there is any brakes sticking, anything dropping, hear anything dropping, any noise under the train.

Q. On this particular occasion did you hear anything?

A. No, sir.

Q. Anything stick?

A. No, sir.

Q. Notice any jar of any kind?

A. No, sir. Made no stop from Utica to Syracuse. Left Utica about five minutes late, went to Syracuse about eleven minutes late.

Mr. Marley: That is all.

(Witness excused.)

WALTER I. VERNON was thereupon called as a witness on behalf of the defendant and, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Just state your name to the jury there, Mr. Vernon?
A. Walter I. Vernon.
Q. Where do you reside, Mr. Vernon?
A. 264 Sixth avenue, Brooklyn, New York.
Q. How long have you resided in Brooklyn, New York?
A. Fifteen years.
Q. And what is your position?
A. Pullman conductor.
Q. For the Pullman Palace Car Company?
A. Yes, sir.
Q. How long have you been connected with the Pullman Palace Car Company?
A. Going on sixteen years.
[fol. 400] Q. And state to the jury whether or not you were on the Pullman—on the train No. 19 out of New York City on the evening of September 27, 1925.
A. Yes, sir.
Q. Did you have charge of just one car, or several cars?
A. Possibly eight or nine cars.
Q. Now, those cars, all the cars on that train are sleeping cars except the club car and baggage car, aren't they?
A. Yes, sir.
Q. You carried nothing but through sleeper passengers, did you?
A. That is all.
Q. Do you recall the circumstances of seeing the plaintiff, Myrtle Johnson, who claims to have struck her head against a Pullman berth in car 64?

A. Yes, sir.

Q. When did you first learn of that?

A. Well, about eleven-thirty to twelve o'clock the following day.

Q. The following day?

A. Yes, sir.

Q. Who called your attention to it?

A. The porter, A. S. Kates.

Q. And then when you found out about it what did you do?

A. I immediately got the maid and went up to see what the trouble was.

Q. Did you see Myrtle Johnson?

A. Yes, sir.

Q. Did you talk to her?

A. Yes, sir.

Q. What did she say?

A. Well, she seemed to feel that she had a stroke or something and was very ill. She was lying in the berth, and the other lady spoke to me.

Q. And what did she say about striking her head against the upper berth?

Mr. Wickersham: Wait just a minute. Do you understand that he is asking you to tell what Mrs. Johnson said?

Mr. Marley: Myrtle Johnson.

The Witness: Yes, sir.

By Mr. Marley:

Q. I am now asking, so as to avoid confusion—I see he has in mind that there is Imogene Johnson, the one that wasn't hurt, and Myrtle Johnson, the woman that was hurt, or claimed to be hurt. Now, then, I am asking you if you talked to the one that was hurt.

A. Yes, sir.

Q. Now, what did she say?

A. I spoke to both.

Q. You spoke to both?

A. Yes, sir.

Q. Now, what did the one——

[fol. 401] A. The one that wasn't hurt explained to me that——

Mr. Wickersham: Just a minute.

Mr. Marley: Just wait a minute. I get the point.

Q. Now, you were talking to the one that wasn't hurt, where was she with reference to the one that was hurt?

A. Standing alongside of the berth.

Q. Right alongside of the berth?

A. Yes, sir.

Q. And was the one that was hurt within hearing of the conversation between you and Imogene?

A. Yes, sir.

Q. All right. Now, what did Imogene say to you in the hearing and presence of Myrtle Johnson concerning the injury and the cause of the injury?

Mr. Wickersham: Just a minute. That is objected to as hearsay and incompetent.

The Court: Well, now, the exception upon which you are relying, Mr. Marley, is where the person, the party to the case, is able to talk; but the evidence so far has shown that this plaintiff couldn't talk; therefore a statement made in her presence couldn't be denied, for she couldn't talk; therefore the exception does not apply.

Mr. Marley: Well, you sustain the objection, then?

The Court: Sustain the objections unless you are going to show by this witness that she could talk.

Mr. Marley: Well, all right.

Q. Did you then undertake to talk to Myrtle Johnson, the one that was supposed to be hurt?

A. Yes, sir.

Q. Did she talk to you?

A. Yes, sir.

Q. All right. Now, then, in the——

The Court: The objection is overruled.

Mr. Marley: Yes.

Mr. Wickersham: Exception

To which action and ruling of the court, the plaintiff, Myrtle Johnson, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the plaintiff Edwad Johnson, then and there at the time, duly excepted and still excepts.

[fol. 402] By Mr. Marley:

Q. Now, then, state what Imogene, the sister-in-law, said to you in the presence and hearing of Myrtle Johnson, the one that was hurt.

A. She said that as Myrtle Johnson was trying to get into the berth to get over her she bumped her head on the upper berth.

Q. Did Imogene say whether she was in the berth at the time Myrtle was trying to get over her?

A. Yes, sir; she was.

Q. She was laying down in the berth there?

A. Yes, sir.

Q. And Myrtle trying to crawl over her?

A. Myrtle trying to crawl over her, and struck her head on the upper berth.

Q. Did she indicate on what part of the head she struck?

A. No, sir.

Q. Now, then, after you talked to Imogene about it, did you talk to Myrtle Johnson about it?

A. Yes, sir.

Q. What did she say?

A. She said she didn't think anything about the bump, and I asked her why she didn't report it that night. She said she didn't think anything about it until the next morning when she woke up and then felt this condition that she was in.

Q. Now, then, did your maid offer to help them in any way?

A. Yes, sir.

Q. What did they do or say with reference to her making the offer?

A. Well, they didn't seem to want her help there.

Mr. Wickersham: Just a minute. I move to strike that out.

The Court: Sustained.

Mr. Marley: Yes.

Q. What did they say with reference to accepting or declining that?

A. I didn't hear the conversation.

Q. You didn't hear the conversation?

A. No, sir.

Q. Then that is all right. Now, then, did you make an offer to get a doctor for them?

A. Yes, sir.

Q. What did they say to you about that?

A. They didn't wish any until they arrived in Chicago.

Q. Did they ask you to have one in Chicago?

A. I said I would have one in Chicago, which they agreed to.

Q. State whether or not you undertook to find a doctor on the train.

[fol. 403] A. Yes, sir. The train was paged straight from the front to the rear and we couldn't find one.

Q. Well, so there was no doctor present?

A. No doctor present.

Mr. Marley: I guess you may cross examine. Wait just a minute.

Q. Did you see these parties in the club car that evening?

A. Yes, sir.

Q. Now, where were they sitting?

A. In the section——

Q. In a section?

A. In the section at the head end of the car.

Q. Were they sitting alone, or somebody with them?

A. Two gentlemen with them.

Q. Two gentlemen with them. What were they doing?

A. Well, they seemed to be drinking lemonade and smoking cigarettes and playing cards.

Q. Just the men smoking cigarettes?

A. No, they all four was smoking.

Q. All four were smoking?

A. Yes, sir.

Q. How often did you see them sitting there in the booth or section smoking cigarettes that evening in the club car?

A. Well, several times up to the time they returned to the sleeper.

Q. Was there any time that you went in there that any of them were not smoking?

A. No, sir.

Mr. Marley: You may cross examine.

Cross-examination.

By Mr. Wickersham:

Q. As I understand you, you just got through saying that they said they didn't want a doctor and to wait until they got to Chicago.

A. Yes, sir.

Q. Then you went on and hunted for a doctor?

A. Yes, sir.

Q. Anyway.

A. Yes, sir.

Q. Even when they didn't want one.

A. Yes, sir. I do that in any case where there is an accident as a matter of protection.

Q. Why, isn't it a fact that Mrs. Imogene Johnson, the woman that was not hurt, urged you to get a doctor?

A. No, sir, it isn't.

Q. And you came and reported that you couldn't find a doctor, and then they urged if you couldn't get a nurse?

[fol. 404] A. No, sir. I did get a nurse.

Q. That is after you couldn't get the doctor, and told them that there wasn't a doctor, isn't that right?

A. I went for the doctor of my own free will, not at their request.

Q. Oh, of course, but what I am saying is you reported you couldn't find a doctor and they asked if there wasn't a nurse on the train.

A. No, sir, I run into the nurse accidentally. Wasn't looking for a nurse.

Q. Who was the nurse?

A. I couldn't tell you the name. It is on the report.

Q. What kind of a nurse was she?

A. Trained nurse; graduate nurse.

Q. White lady?

A. Yes, sir.

Q. Is she here?

A. I don't know.

Q. You have seen her?

A. No, sir.

Q. Around the court house?

A. No, sir.

Q. You were present when the Pullman porter was there, too, were you?

A. What do you mean?

Q. At this berth, when this woman was laying in bed there the next morning, and this conversation.

A. He didn't come back with me. He came and got me, told me what had—that these people were hurt, somebody was hurt, and wanted to see me. I don't know that he came back.

Q. Was that Pullman porter there when you were talking?

A. Talking to——

Q. Talking to these two women.

A. I don't know whether he was or not. He may have been behind me and may not.

Q. I just want you to tell what your best recollection is. Was that Pullman porter there while you were talking to them?

A. I say I don't know.

Q. Have you any recollection whether he was in that car?

A. He was in the car, yes. He was in the car.

Q. Where was he, if he was in the car?

A. Oh, I couldn't tell you that. May have been standing right directly behind me.

Q. May have been?

A. Yes.

Q. He might have been in the club car?

A. Yes, might have been, but I know he was right in that car. He came right directly up after that.

Q. Oh, then he was right there by you?

A. I say I don't know whether he was standing by me or not. I wasn't interested in him. I was interested in the injured party.

[fol. 405] Q. How long were you there when—with those women, talking to them?

A. Possibly fifteen minutes.

Q. You stayed there fifteen minutes?

A. Possibly that long; maybe ten minutes.

Q. Just stop a minute and think. You come there and find that a woman is sick and you remain there fifteen minutes, maybe?

A. Yes.

Q. You think that is correct?

A. Yes, sir. It takes some time to find out what is the matter; what caused the happening.

Q. Why, couldn't you and didn't you find out in a minute, half a minute?

A. No, sir; you couldn't.

Q. Couldn't do that?

A. No, sir; you couldn't, not in a case like that.

Q. All right; and you stayed there about fifteen minutes, that is what you want us to believe?

Mr. Marley: I object to that, your honor, as not proper cross-examination.

The Court: Overruled.

Mr. Marley: Note an exception.

To which action and ruling of the court, the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time, duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Edward Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time, duly excepted and still excepts.

The Witness: I don't know whether you want to believe it or not, but that is the truth.

By Mr. Wickersham:

Q. Then what did you do after fifteen minutes of standing around there?

A. I went looking for a doctor. The maid went one way——

Q. And that looking for a doctor, now, was over the protest of these people?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. With a woman that was paralyzed on the side, right side, you found that, knew that, didn't you?

A. No, I didn't know that.

Q. You didn't know that?

A. No, sir; I didn't.

Q. You couldn't learn that there?

A. No, sir.

[fol. 406] Mr. Marley: I object to that, your honor; I don't think that is a proper cross-examination.

The Court: Overruled.

Mr. Marley: Save an exception.

To which action and ruling of the court the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted, and still excepts.

To which action and ruling of the court the defendant in the case of Edward Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted, and still excepts.

By Mr. Wickersham:

Q. And this woman who was hurt was talking freely?

A. It was plain enough for me to hear, understand her.

Q. Plain?

A. Yes, sir.

Q. Perfectly plain; conversed with her same as you did the other woman?

A. I didn't say perfectly plain, but plain enough to be understood.

Q. Well, now, let me understand you. What difficulty did she apparently have in talking to you, if any?

A. Possibly had a little twist in her mouth, but that doesn't say you couldn't understand her.

Q. Well, what difficulty did she have in expressing herself, any?

A. Yes, she had a sort of a twist to her mouth.

Q. Which way; what kind of twist?

A. Her mouth was drawn to one side a little bit.

Q. Was she dressed?

A. No, sir, she was under the bed clothes. I don't know whether she was dressed or not.

Q. You had seen the woman before that, hadn't you, the evening before?

A. Yes.

Q. No twist, no twitching of her face at all before?

A. No, no.

Q. None whatever; and you come there to see her in a berth next morning, late in the morning.

A. Yes, sir

Q. Still undressed.

A. Yes, sir.

Q. And she has got a twitch and her face is drawn?

A. Yes, sir.

Q. Did you see her move her right arm or leg?

A. No, sir, I wasn't——

Q. What?

[fol. 407] A. No, sir, I didn't pay any attention to that.

Q. Oh, you didn't pay any attention to her, and you were there for fifteen minutes?

A. Yes, sir.

Q. And didn't learn during that time——

A. No; at that time——

Q. Wait a minute. Wait a minute. Didn't learn during that time that the woman couldn't use her right side?

A. Seeing she had been up in the dressing room earlier in the morning, I didn't figure she was so she couldn't move.

Q. Oh, you now say she was up and dressed?

Mr. Marley: No, he didn't say that.

The Witness: I didn't say anything about dressed.

By Mr. Wickersham:

Q. What did you say?

A. I said she was in the dressing room.

Q. Oh, well. Was she dressed when you saw her?

A. I said she was under the covers. I don't know whether she had her clothes on or not.

Q. During the entire time, now, you were there, you never learned that there was any paralysis of the woman at all?

A. I told you there was a twitch to her mouth.

Q. That is, that is all you learned?

A. That is all I learned, yes, sir. As far as the rest of her body was concerned, I didn't know anything.

Q. Where did you leave that train?

A. Chicago.

Q. Did you help carry her off the train?

A. No, sir.

Q. Did you see anybody help carry her off?

A. Yes, sir.

Q. You knew then she was paralyzed, didn't you?

A. Knew she wasn't able to walk off.

Q. Well——

A. We often have them carried off that are not paralyzed.

Q. Well, that was what you understood, now, wasn't it, that she was paralyzed in her right side?

A. Well, I won't agree on that. I didn't understand she was paralyzed at all.

Q. But she couldn't walk, couldn't use her right hand, as far as you knew, could she?

A. I don't know anything about her right hand.

Q. Did you see them pick her up?

A. No, sir, I wasn't near her when they took her off, but I knew they took her off; carried her off.

Q. When was the first time that your attention was in any manner called by the claim agent of this railroad about whether there was an unusual jerk or lurch of this train?

[fol. 408] A. Never.

Q. No claim agent ever asked you that question?

A. No, sir. I have never seen the claim agent until I came here yesterday.

Q. And no report was requested of you?

A. No, sir.

Q. And you never talked with any lawyer about it?

A. No, sir.

Q. And nobody ever knew until you took this stand here—you didn't know there was anybody going to ask you such a question?

A. I turned in a report the day the thing happened, but nothing about any jerking of the train.

Q. You made a report of it?

A. Yes, sir, of the condition of this lady.

Q. So nobody ever called your attention to whether there was any lurch or jerk until after you got on that stand?

A. No, sir, because there wasn't any lurch.

Q. Well, others might disagree with you.

A. That might be.

Q. How many persons took her off that train in Chicago?

A. I couldn't say. I wasn't there at the car landing where she was taken off. Probably two. It is the customary number we take people off when they are ill.

Q. Her berth was on the north side of the train, wasn't it, as it went west?

A. Yes. Yes, on the north side.

Q. The upper berth was made down——

A. Regulation.

Q. Yes, while they were here in the club car?

A. Yes, sir.

Q. You know that?

A. Yes, the berth was made down, the section made down.

Q. Meaning that the upper berth was down and made up.

A. The upper was down, made up the regulation way.

The Court: Let's see. He said the berth is on the north side.

Mr. Wickersham: Yes, sir, the berth is on the north side as the train went west. That means the right hand, as the train was going.

Q. Now, you never learned that this woman was paralyzed, but you did say on direct examination when you got there you found that the woman had a stroke and was very ill. What do you mean by stroke?

A. I said she acted as though she may have had a stroke.

Q. Well, didn't you mean by that paralysis, she had a stroke?

A. Possibly in medical term, yes.

[fol. 409] Q. In common sense terms, as you understand it; didn't you understand stroke means paralysis?

A. No, sir, I don't know anything about that.

Q. What do you think it means?

(No answer.)

Q. Please answer my question.

A. Well, I suppose it is a form of paralysis.

Q. Yes. That is what you thought right at the time. Now, what do you mean by telling me that you never did know or have any idea she had paralysis?

A. I said that I didn't know that she was paralyzed all on one side.

Q. Oh, all on one side.

A. That is what you said before, when you asked the question.

Q. Why did you think she had that stroke on either side?

A. The only part I saw was her face.

Mr. Wickersham: Oh, I think that is all.

The Court: Call your next witness.

Mr. Marley: Wait a minute. I am not quite through yet.

Redirect examination.

By Mr. Marley:

Q. I wish you would state to the jury what kind of sleepers these were on the train that night. Were they the regular standard sleepers of the Pullman Palace Car Company?

A. Standard Pullman sleepers; yes, sir.

Q. Do you remember how many sleepers there were on that train that night?

A. Well, we average about eight or nine cars.

Q. Eight or nine cars. Now, were they what is known as the Standard equipment of the New York Central Lines?

A. Yes, sir, regular standard.

Q. Speaking now of the upper berth, that comes down; just describe to the jury whether or not that upper berth as it comes down is round or has an edge or is rough or smooth. Just describe it to the jury.

A. Well, it is smooth. It comes around, it has the form of a bevel edge on it, don't you know. Comes right around smooth around the edge there.

Q. It is curved, isn't it?

A. Yes, it is curved.

Mr. Wickersham: You are meaning now the very bottom of it when it is down?

Mr. Marley: I mean anything, bottom or top.

[fol. 410] Q. Take either the top or bottom, is there any sharp edge on it that a human head could hit?

A. No, sir. You would have to hit in the top to hit any sharp edge.

Q. Now, that berth comes down like this; it is up this way, is it not, and you let it down like this, and that is the bottom of the upper berth and the top of the lower berth, isn't it?

A. If I could have a piece of paper and a pencil I could describe it to the jury better than telling it to them.

Mr. Wickersham: Oh, I think we all understand that.

Mr. Marley: I know, but you have been speaking, now, about a sharp edge. I want to see if there is a sharp edge on the bottom of a Pullman upper berth.

The Witness: That would be the position of the berth when it is up. When it is down it is the bottom of it. In other words, the bottom of the berth is right along here (drawing).

Q. This is the top of the bottom berth right there.

A. This is the top of the bottom berth right there.

Q. And that is round, isn't it?

A. That is rounded, just as it forms there, and that lets down that way.

Q. Now, up here, as you come up here, is that round or sharp?

A. That is round all the way around.

Mr. Marley: Yes. That is all.

The Court: Anything further, Mr. Wickersham?

Mr. Wickersham: Oh, that is all.

(Witness excused.)

Edward Y. Chesebro was thereupon called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marley:

Q. Give your name to the jury, please, Mr. Chesebro.

A. Edward Y. Chesebro.

Q. Where do you reside, Mr. Chesebro?

A. Utica, New York.

Q. How long have you resided in Utica?

A. Approximately four years.

Q. Where did you reside prior to that time?

[fol. 411] A. Albany, New York.

Q. How long did you reside in Albany?

A. Well——

Q. About.

A. From about 1899 until 1906. Then I was away from there from 1906 to 1910. I was back to Albany from 1910 until 1922. In 1922 I went to Utica.

Q. Now, Mr. Chesebro, what position, if any, do you occupy?

A. I am supervisor of fuel and locomotive performance on district No. 1 of the New York Central.

Q. What is that district; from where to where?

A. It takes in from Syracuse to New York on the main line, the River division, the Harlem & Putnam division, the Adirondack & Ottawa division, and the Hudson & Harlem Electric division.

Q. Is the track from Albany, New York, to Syracuse, New York, under your jurisdiction and in that division?

A. Yes, sir. That is the Mohawk division.

Q. That is the Mohawk division?

A. Yes, sir.

Q. Now, how long have you had supervision of that Mohawk division?

A. Since 1923.

Q. And how long have you been on that division in one capacity or another?

A. Well, I went to work on that division in 1899.

Q. 1899?

A. Yes, sir.

Q. Now, what is the condition of the road bed and rails of that division from, say, Harmon, New York, to Syracuse, New York?

A. Our road bed is completely ballast, stone ballast, from Harmon, New York, all the way to Syracuse, New York, on the main line. That is on the main line. Both track 1 and track 2, which are the high speed tracks that we operate our fast passenger trains on.

Q. No. 1 carries what direction?

A. No 1 is the westbound track.

Q. And No. 2 is what?

A. The east bound track.

Q. Now, how many tracks are there on the New York Central from Albany, New York, to Buffalo, in all?

A. Well, on the main line between Albany and Buffalo there is four tracks. Between Albany and New York City part of the way there is four tracks and part of the way there is only two tracks.

Q. That is down the Hudson?

A. That is below Albany.

Q. Yes. Now, do you have men report to you any condition of the track or any time that the track should be out of condition; anything of that kind?

A. No, sir.

[fol. 412] Q. You do not. Now, what is the distance from Utica, New York, to Syracuse?

A. It is approximately 53 miles. There is a few fractions in there.

Q. What is the running time on that for this No. 19 train, about?

A. At the present time, or at the time of the accident?

Q. At the time of the accident.

A. It was 1 hour and 15 minutes, I believe.

Q. For 53 miles?

A. Yes.

Q. And what is the condition of the road bed, of the track, with reference to being smooth and straight there?

A. Our track is very smooth. There is one or two places where we have approximately twenty-five one-thousandths of one per cent. grade; not to exceed three tenths of one per cent. grade anywhere, and I don't think that we have a curve in that track that is over a fifteen-degree curve between Utica and Syracuse.

Q. Does this route have any particular designated name by which it is called?

A. I beg your pardon?

Q. Has a name, particular name, by which it is designated? In other words, is it called a water level route, anything of that kind?

A. Yes, sir, it is.

Q. Is it known as the water level route?

A. Yes, sir, it is known as the water level route.

Mr. Marley: You may cross-examine.

Mr. Wickersham: No examination.

The Court: That is all.

(Witness excused.)

The Court: Call your next.

Mr. Marley: That is our case, your honor.

Whereupon the defendant rested its case.

The Court: Any rebuttal, Mr. Wickersham?
Mr. Wickersham: Yes, your honor.
The Court: Very well.

And thereupon, to further maintain the issues on her behalf, the plaintiff Myrtle J. Johnson offered and introduced the following evidence in rebuttal, both oral and documentary, in words and figures as follows, to-wit:

[fol. 413] And thereupon, to further maintain the issues on his behalf, the plaintiff Edward H. Johnson offered and introduced the following evidence in rebuttal, both oral and documentary, in words and figures as follows, to-wit:

Mrs. Inogene Jonsson was thereupon recalled as a witness on behalf of the plaintiffs in rebuttal and, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Wickersham:

Q. Did you hear the testimony of the colored man named Albert S. Kates?

A. Yes, sir.

Q. He testified, in substance, that the day following the injury happening we complain of that he had a conversation with you about twelve or twelve thirty as to Mrs. Myrtle Johnson in which you stated in substance that Mrs. Myrtle Johnson bumped her head when getting into the berth. Did you have any such conversation with that man?

A. I merely asked him, rang for him and asked him to get the conductor; my friend had been hurt the night before and I wanted the conductor to come to see if he could find a doctor on the train.

Q. Did you make the statement to him that your sister in-law Myrtle got hurt trying to get in the berth?

A. No, not that she had got hurt trying to get in the berth.

Q. Did you hear the testimony of that colored maid, Emmy Matthews?

A. Yes, sir.

Q. That was just on the stand. She testified that a bowl of soup was brought to Myrtle the next noon. Is that true?

Mr. Marley: I object to that, your honor.

Mr. Wickersham: What?

Mr. Marley: As to whether it is true or not. She can state what happened.

By Mr. Wickersham:

Q. Well, did you have any bowl of soup there for her?

A. I sent a bowl of peaches and a cup of coffee.

Q. Peaches. Did you have any soup?

A. No, sir.

Q. Did you have any conversation with her in which you stated in substance or effect that Myrtle Johnson was hurt while trying to get in the berth?

A. No, sir.

Q. Now, then, you heard the testimony of this Pullman conductor, Walter I. Vernon, did you?

A. Yes, sir.

Q. You were sitting here in the court room?

A. Yes.

[fol. 414] Q. Did you hear him testify that when he came there to that berth about noon time of the day after the happening of the accident——

A. Yes.

Q. —that he stayed there about fifteen minutes?

A. Yes.

Q. Did he stay there fifteen minutes?

A. Fifteen minutes is quite a long time.

Mr. Marley: Move to strike out that answer, your honor.

The Court: Sustained.

By Mr. Wickersham:

Q. Did he stay there fifteen minutes?

A. No.

Q. Did you hear him testify in substance and effect that in the presence of Myrtle that you told him that Myrtle was hurt when trying to climb over you and get into the berth during the night time?

A. Yes, I heard him say that.

Q. Did you make any such statement as that?

A. I did not.

Q. Did you discuss with him anything concerning Myrtle getting over you at that time in the berth?

A. No, sir.

Q. Did you discuss with him that—say anything to him that Myrtle had bumped her head trying to get into the berth?

A. I did not.

Q. Did Myrtle, when that conductor came there, carry on any conversation at all with Vernon?

A. She did not.

Q. Did you hear Vernon say when he was on the stand that you two didn't want a doctor?

A. Yes, I heard him say it.

Q. Did you make any such statement to that man?

A. I asked him to find me a doctor.

Q. And did he report to you anything about a doctor?

A. He said there was no doctor on the train, after having been gone several minutes.

Q. Were you present in the wash room or the ladies' room of that Pullman car when this colored maid was there?

A. Yes. You mean the day of the accident?

Q. That next morning.

A. I mean the next morning.

Q. Yes.

A. Yes.

Q. Did Myrtle carry on any conversation with that colored maid in that room?

A. No.

Q. Did she have anything to say about having had any bilious attack or dizzy spell or anything of that kind?

A. It seemed impossible for us to understand anything from her. She did nothing but cry hysterically.

[fol. 415] Mr. Marley: I object to that and move to strike it out.

The Court: Sustained.

By Mr. Wickersham:

Q. Just answer "yes" or "no." Did she say Myrtle said anything to this colored maid on such a subject?

A. No, sir.

Q. You saw this Dr. Siminson that was on the stand?

A. Yes.

Q. Did that man make any examination of Myrtle Johnson in Chicago?

Mr. Marley: I object to that, your honor, as calling for a conclusion of the witness. She can tell what, if anything was done.

The Court: Overruled.

Mr. Marley: Note an exception.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

A. He did not.

By Mr. Wickersham:

Q. Who was the doctor?

A. Dr. Pierce.

Q. Dr. Pierce. Did you write that man's name down, Dr. Pierce's name, that made the examination?

A. I wrote it at the time on a Western Union telegraph slip.

Q. Did you do that there in Chicago?

A. Yes, sir.

Q. Is that the name that you wrote down there, Dr. Pierce, that made the examination?

A. Yes, sir.

Q. Was he the only one who made any kind of an examination?

A. Yes, sir.

Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Now, Imogene, you know when your sister-in-law was eating out of a bowl there, that bowl was liquid, wasn't it? It wasn't solid? Were they solid, fresh peaches, or canned peaches?

A. They were fresh peaches with cream on them.

[fol. 416] Q. Fresh peaches, and no liquid on them at all?

A. Cream over them.

Q. Cream over them?

A. Yes.

Q. Now, when you were feeding her there, did you feed her?

A. I tried to.

Q. I know. Well, now, when you did you gave her the cream, didn't you? You didn't give her the peaches?

A. Well, I chopped them with the spoon and tried to feed her.

Q. And fed them in with the cream?

A. Yes, tried to.

Q. And the cream was in the spoon?

A. Yes.

Mr. Marley: Now, I guess that is all.

Mr. Wickersham: That is all.

(Witness excused.)

Mrs. Myrtle Johnson was thereupon recalled as a witness in behalf of the plaintiffs in rebuttal and, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Wickersham:

Q. Mrs. Johnson, you have been sitting in the court room in the hearing of these witnesses for the defense?

A. I have.

Q. Did you hear the testimony of the colored man, Albert Kates?

A. I did.

Q. Did you hear him testify in substance that he had a conversation with Myrtle in your presence—with Imogene in your presence there at your berth about noon the next day after this accident?

A. I didn't hear him.

Q. You didn't hear him. Did you have any conversation of any kind or character with that colored man?

A. No, sir.

Q. Did you hear the testimony of this colored maid, Emmy Matthews?

A. I did.

Q. To the effect that she had a conversation with you in the ladies' dressing room at the end of the Pullman on the next noon after the accident, after you got up? Did you hear that testimony?

A. Yes, sir, I did.

Q. Did you have any talk whatever with that woman at that time?

A. No, sir, never.

Q. Could you talk at that time?

A. No, sir, I couldn't talk at that time.

[fol. 417] Q. Did you hear her testify that that noon you were being served with a bowl of soup?

A. Yes.

Q. Did you have any soup?

A. No, I didn't.

Q. Did you hear the testimony of Walter I. Vernon, this Pullman porter?

A. Yes, sir.

Mr. Marley: Conductor.

Mr. Wickersham: Yes, Pullman conductor.

A. Yes.

Q. In substance that the next noon after this accident he came there to your berth and stayed there about fifteen minutes. Did you hear that?

A. Yes, I heard it.

Q. How long did that man stay there?

A. I didn't see him.

Q. Didn't see him?

A. No.

Q. Did you have any talk whatever with him?

A. No, sir.

Q. Could you talk at that time?

A. No, sir, couldn't.

Q. Did you hear him testify that in your presence as you were there he had a conversation with Imogene in which Imogene said in substance that you had been hurt while trying to climb over Imogene in getting into the berth? Did you hear that testimony?

A. Yes, I heard it.

Q. Did any such conversation occur?

A. No, it certainly did not.

Q. Did you hear this colored woman, Matthews, testify that you said that you had been hurt by climbing into the berth and bumping your head?

A. I heard her say it.

Q. Did you have any such conversation with her?

A. I couldn't talk.

Q. Did you hear any such thing said between her and Imogene, or anybody?

A. No.

Mr. Wickersham: You may examine.

Cross-examination.

By Mr. Marley:

Q. Mrs. Johnson, you had a bowl of peaches and cream, did you?

A. Yes.

Q. And they were feeding you the cream and peaches out of a bowl, weren't they?

A. Well, Imogene cut up the peaches.

[fol. 418] Q. Well, they were, weren't they? That is what I am getting at. They were just feeding you out of the bowl; they had the bowl and was feeding you peaches and cream or cream and peaches out of the bowl, weren't they?

A. She tried to.

Q. They tried to do it, and she was in the act of doing it?

A. Yes.

Q. So it was peaches and cream instead of soup, is that right?

A. Yes.

Mr. Marley: That is all.

Redirect examination.

By Mr. Wickersham:

Q. I forgot to ask you about this young doctor that was on the stand, Dr. Siminson. You heard him?

A. Yes, sir, I did.

Q. Did that man make any examination whatever of you in Chicago?

A. No, sir. He carried me off the train; picked me up.
Q. Did he at any time——
A. No.
Q. —have any conversation with you?
A. No. He sat there in the back while this Dr. Pierce examined me.
Q. Who examined you?
A. Dr. Pierce.
Q. Did any other doctor examine you at that time, but Dr. Pierce?
A. No.

Mr. Wickersham: You may examine.
Mr. Marley: No examination.
The Court: That is all.

(Witness excused.)

Mr. Wickersham: Plaintiff rests.

Whereupon the plaintiffs [*against*] rested their case.

DEFENDANT'S REQUESTED INSTRUCTIONS AND REFUSAL THEREOF

The Court: Mr. Marley, have you any requests for instructions?

Mr. Marley: Yes, I have, your Honor, but I am going to renew my request for a peremptory instruction.

[fol. 419] The Court: Defendant requests instructions "C" and "D" at the close of all the evidences in the case, which are by the court refused, and to which the defendant excepts to each refusal to give each instruction.

To which action and ruling of the court in so refusing to give instruction lettered "C" as prayed by the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, defendant, by its counsel, then and there at the time duly excepted and still excepts.

Which said instruction lettered "C," so prayed by defendant and which the court refused to give, is in words and figures as follows, to wit:

"The court instructs the jury that under the pleadings and the evidence the plaintiff Edward H. Johnson cannot recover in his action and your verdict must be for the defendant New York Central Railroad Company."

And to which action and ruling of the court in so refusing to give instruction lettered "D" as prayed by the defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, said defendant by its counsel, then and there at the time duly excepted and still excepts.

Which said instruction lettered "D" so prayed by defendant and which the court refused to give, is in words and figures as follows, to wit:

The court instructs the jury that under the pleadings and the evidence the plaintiff Myrtle J. Johnson cannot recover in her action and your verdict must be for the defendant New York Central Railroad Company.

The Court: During this recess, gentlemen, as during all other recess, you will not discuss the case among yourselves nor with any other person, nor form any opinion until you have heard the argument and the charge of the court and until the case is submitted to you.

Court will stand at recess until 9:30 tomorrow morning.

(Whereupon an adjournment was taken until 9:30 o'clock a. m., Wednesday, February 23, 1927.)

[fol. 420] After Adjournment

February 23, 1927—9:30 a. m.

Court convened pursuant to adjournment.

Argument on Behalf of Plaintiff

Mr. Chilcott: May it please the court and gentlemen of the jury, I wish to thank the jury for the close attention that they have paid in this case to every word which has been uttered by the witnesses, by counsel, and by any person in the case. It is an evidence of the consideration which the jury is giving to the introduction of evidence and of the

fixed determination on the part of the jury to return a verdict which will speak the truth. And gentlemen of the jury, your verdict will speak the truth, and when it does the plaintiff will be satisfied, the defendant will be satisfied, and every demand of the law will be met.

Now, gentlemen, at the outset of this case I told you what we would attempt to prove in this case. For nearly two days we brought twenty-one witnesses in this case, and we proved our case to the hilt; and in his charge his honor will tell you that when a person is a passenger on a train and something unusual happens on that train by which that passenger is injured that the law presumes that the carrier was negligent, and the burden of proof is cast upon the defendant to prove that they were not negligent and that the injuries resulted from something which they could not help and which was beyond their control.

Now, gentlemen of the jury, has that condition been met in this case? The evidence in this case discloses that these two young ladies went back there to go to bed, and they were standing there as indicated by the evidence when there came a violent jerking and jolt of this car, as though it had stopped, which threw this young lady around until the left side of her head hit against the corner of the lower berth. This diagram was made by a witness for the defendant. It resulted in the tragedy which has wrecked that girl's life, a tragedy which has caused her to be a hopeless cripple for the rest of her life and plunged her into an abyss of darkness.

Now, gentlemen of the jury, has this defendant—has this defendant proven to the satisfaction of this jury that it was free from negligence? Has it done so? Has it exhausted the means within its power for doing so? Has there been one scintilla of evidence introduced in this case that a jury [fol. 421] of common experience and common sense would want to believe?

You have watched the evidence in this case and seen one defense after another crumble to dust. In an hour and fifteen minutes this defendant put on all the defense that they had. In his opening statement to the jury counsel for the defendant, and I believe that he believed it—and I will say to this jury that it is my firm belief that this whole defense is a claim agent defense, prepared by the claim department

of the New York Central Railroad—and he said that they would prove that before this girl went away on that vacation that she was exhausted and suffering from nervous irritation and that she had consulted a physician who had ordered her to have a rest. Was there one bit of evidence in this case proving that point; one bit? Not a bit, gentlemen. He said that when she was in New York that she exhausted herself in taking a post-graduate course at the Nestle Institute. Was there one scintilla of evidence to prove that fact? Not a one, gentlemen. The evidence showed that it was a year before that she had taken that course at the Nestle Institute. They said that she became dizzy and suffering from double vision, and to prove that fact they produced the negro maid on that train, whom this women had only seen for a half an hour, and tried to make this jury believe that in that period of time she became sufficiently confidential with that girl to tell her of the little incidents like that in her life. Now, does this jury believe that?

Now, Gentlemen of the jury, when you go into this jury box you bring in here the common, ordinary sense and experience that you use in your every-day life, and you know that girls of this character do not confide their thoughts of that character to negro maids; this girl who sat here on the witness stand and recited her testimony as though she had learned it by heart.

But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.

Mr. Marley: I object to that, your honor. There is no evidence of that at all. It isn't proper argument.

The Court: The objection is overruled, in view of the examination of the witnesses and of the testimony in the case.

[fol. 422] Mr. Marley: Note an exception, please.

To which action and ruling of the court the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Edward H. Johnson vs. New York Central Rail-

road Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Chilcott: Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.

Mr. Marley: Our objection continues to this line of argument.

The Court: Yes, that will be understood.

Mr. Marley: And note an exception, please.

To which action and ruling of the court in overruling said objection the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court in overruling said objection, the defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time, duly excepted and still excepts.

Mr. Chilcott: They told this jury that they would bring the engineer here, that had forty-two and a half year's experience. They told the jury here they would bring the fireman, that had ten year's experience. Did you see any of them on the stand? Not a one of them. Who, gentlemen, caused that lurch and jerk if it was caused on that train? Who was in charge of that engine? The engineer was in charge of it, and the fireman. Was one of them brought here? They brought everybody but the engineer and the fireman.

They [*they*] say she was examined by a doctor in Chicago. They say she was examined by a doctor in Chicago. In [fol. 423] their opening statement they said she was examined by the local surgeon of the New York Central in Chicago. Who did they bring down here? They brought down here the assistant of the local surgeon, and proved that their local surgeon had gone to California only a week before this trial begun. Only a week before this trial begun, and for fifteen months they have known we were suing

them for $35,000 in this case, yet they let their man go out to California and bring in an assistant whom these girls say never did examine her.

Now, gentlemen, in the opening statement in this case they said that she never had received any treatment for a blow on the head. Think of that, gentlemen. She never had received any treatment for a blow on the head; and Dr. St. Elmo Sanders came here and told you that she was in his hospital for ten days, for ten days she was there and couldn't utter a word, couldn't utter a word; that the paralysis of her right side was complete; she couldn't speak. Yet the negro porter, the negro maid and the Pullman conductor had the temerity to come in and tell this jury that she carried on a coherent conversation with them on that car, when the evidence showed that the paralysis was more complete at the beginning than it was at any other time, and she gradually got better.

Now, gentlemen, it isn't within the realm of common sense or reason that you would believe such testimony as that.

No, gentlemen, this defendant, if that testimony of its agents, subordinates, is to be believed, knew where these people were on that train every minute from the time they got on the train until they got off of it. They knew when they came on the train, the exact movements and motions that they made to put their suit cases in that berth, they knew the exact time that they went into the dining car, they knew the exact time they went into the club car, they knew the exact time when they came out of the club car; and that, gentlemen, was before they had any notice of injury, before they knew that this girl was claiming any injury, before she had received an injury. I don't know why they paid such particular attention to these people, but if they knew that they knew where every passenger was on that train; they had access to the charts of the Pullman company, they produced the Pullman witnesses in this case; but not a one has testified contrary to these girls. Nobody but the members or parts of the members of that train crew has been here. They didn't produce the engineer, [fol. 424] th-y didn't produce the fireman. The burden of proof is on them to show they were not negligent in this case.

Mr. Marley: I except to that remark your Honor.

The Court: That is a matter, of course, for the court's charge to the jury, what the law is. Counsel may anticipate what the court will charge, but sometimes counsel may err in that regard.

Mr. Marley: Exception, please.

To which action and ruling of the court the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, by its counsel then and there at the time duly excepted and still excepts.

To which action and ruling of the court, the defendant in the case of Edward Johnson vs. New York Central Railroad Company, by its counsel, then and there at the time duly excepted and still excepts.

Mr. Chilcott: Now, gentlemen, I don't know what defense could be interposed in this case. I have given you my idea. You have seen the character of the defense. In my opinion, gentlemen, there hasn't been one scintilla of evidence in this case supporting the defense. I haven't seen any defense.

We are suing this company for $25,000 for this girl, who will be a cripple the rest of her life, who will forever drag that foot, who will never be able to dance, who will never be able to sing, who will never be able to play the piano, who will never be able to be a wife to her husband; never in this world, gentlemen. She has a paralysis which the doctors tell you is permanent from now on of her whole right side. I won't say a paralysis; a partial paralysis. You can see how she walks. She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most— the worst disease that is known in human history, a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one scintilla of evidence in this case to justify it.

[fol. 425] We produced doctors in this case that we didn't have to produce in order to show her injuries, to prove that

she didn't have that disease, because she was reaching out and struggling and trying to grasp at every straw which would save her and every straw which would make her well, and made a mistake; made a mistake in choosing a doctor who gave her a treatment which resulted in arsenical poisoning. And they seek to say that she should not recover from this defendant because he made a mistake and she suffered the agonies of the damned in St. Margaret's hospital, where she had a rash from her head to her heels, where she lost all her hair, all as a result of the inefficiency, I might say, or mistake of one doctor. I won't say inefficiency; I will say the mistake of one doctor. Of course, we are all human. To err is human. He made a mistake. But she shouldn't suffer for that. She shouldn't have any more heaped upon her than has been heaped upon her, and this defendant should not be permitted to take advantage of the mistake of that doctor and of the suffering of this girl.

Now, gentlemen, my time is about up. I believe I have one more minute. My time is about up. I have told you what I think of this case. I don't see—I may be prejudiced in favor of my client—I am. She has every sympathy that I have in this case. You will hear what Mr. Marley has to say in defense of this defendant. You will then hear my associate Mr. Wickersham, and after you have heard the arguments and receive the charge from the court I know that you will return a verdict for this plaintiff which will speak the truth and which will compensate her, as far as money, can compensate her, for the injuries which she has received; and I will say this, that no money, no amount of money, will ever bring back to her the youth and beauty which she had in the first flush of glorious womanhood, that she had when she went there to New York and returned a hopeless cripple, to be a hopeless cripple the rest of her life.

Thank you very much.

Argument on Behalf of the Defendant

Mr. Marley: May it please the Court and the Gentlemen of the July, I want to thank you, too because I think you have all given very close attention to this case, and of

course, we are all sworn as officers of the Court and you as an arm of the Court to decide these things justly and [fol. 426] impartially, according to the evidence as you find it and according to the law as given to you by the Court.

Now, it is one of the common things that we are not all blessed with the same intellectual powers, we are not all blessed with the same keenness of perception, we are not all blessed with the same retentiveness of memory, you will find that out when you go to the jury room because you will find you yourselves are going to honestly differ sometimes as to what the testimony is, what the witnesses said; and by arguing back and forth between each other, you will finally reconcile your minds and come to a decision as to what the evidence did show and what the witnesses testified to; and I would rather trust your combined views and judgment on that than to trust my own memory, because, as you can readily see, in handling a case, interrogating witnesses, etc., a great many things can be overlooked or forgotten, and it is for you to say whether your recollection of it is better than mine under the circumstances.

But I want to call your attention to a few things, then I will take up the questions in this case. In the first place some comment has been made by the attorney and the suggestion has been made in the interrogation of Dr. Pierce, as to why he wasn't here. Now, that works both ways. It is a poor rule that doesn't work both ways. Now, as you will remember, this party had Dr. Woody, the first doctor she ever had; the one that attended her longer than any other doctor, much longer. I think the evidence will show you from November of that year, 1925, until February of the following year. There was also a Dr. Mathias who is probably known to a good many of you, they didn't bring in. We had no opportunity to cross examine them. And Dr. Woody especially was the one that saw her first, before she ever had this mistaken treatment by Dr. Geraghty. Now, we didn't have a chance to show that. I don't attribute them any unfair motive in that; it was just one of those oversights. I don't attribute them any unfair motive in not having Dr. Mathias here. It was an oversight.

Q. Now, let's take Dr. Pierce. What on God's green earth did Dr. Pierce, know about this case, excepting the fact that he examined her head in Chicago? He knew nothing about it. He had no opportunity to examine her. He had no opportunity to make any diagnosis whatever. The only question that came up was with Dr. Simonson. If you will remember the testimony of Imogene, she said that the "small doctor helped to take her sister-in-law off the {fol. 427} train." That was Dr. Simonson. Now, Dr. Simonson is the one that testified that she said she had had double vision for two or three months before.

Now, then, another thing I want to call your attention to because I believe Imogene and Myrtle both undertook to tell the truth according to their understanding of the situation—I don't think either one undertook to misrepresent, and I want to say to you I don't believe any of them did. I think they all tried to give the straight of it, and it is for you to reconcile according to your own deductions and based upon your own human experiences.

Now then, Myrtle said, of course—and you will remember how I tried to bring it out, and I tried to bring it out thoroughly—it was on the left hand side of the car. Now I am satisfied from the testimony of the Pullman conductor it was on the right side of the car, and that is more in harmony with the entire situation. Now, I think in that there is an honest mistake on her part, and I think you should consider she testified it was on the right side of the car rather than on the left, and not consider that any inconsistent statement on her part.

Now we are going to take up first, gentlemen, the question of this condition. What is this condition? Now they put on twenty-one witnesses, that is true, but what were those witnesses testifying to? To the condition of this poor woman. They were merely testifying to the condition. You didn't need those witnesses to tell you her condition. You could tell it by looking at her on the witness stand. You gentlemen have intelligence, you have eyes and you have understanding, and you have the ordinary human experience. Now look at that woman. You can see that her condition is unfortunate, that is true. Now, there was something said about me with reference to my opening statement. Did you hear me say a word about syphilis? What

was my opening statement, gentlemen? My opening statement was to the effect that she had been a pretty vivacious, energetic, ambitious girl, weighing 160 pounds; and take her height, gentlemen of the jury, and her frame and put 160 pounds on it and she is a woman that is heavy on her feet considering her frame.

Now, what did I do? I said that she had gone to California, up to Canada—I have got to be brief, gentlemen—on through down to New York. She was sight seeing, carrying that heavy weight, I said that to show that by the excitement of travel, by the ambition of her business, the [fol. 428] desire to be vivacious and to excel in her business was causing her to consume her physical energy as well as her nervous energy, and the circumstances showed—I think I will get to that in a minute.

Now what was the result? She went down through and went to New York. When she went to New York, she was just like any other girl, visiting New York on business; she wanted to see the sights. She probably taxed her physical energy, she probably taxed her nervous energy; she went up into New York, she went around and hurried to make the train and when they got in what did Imogene say? They got in and went and ate a large dinner. They were all very hungry. Then they went in the club car, played cards, there was some evidence that they smoked and some evidence that they didn't—what difference would it make? Smoking is common to the young ladies of today down East. They are all smoking. There is nothing wrong about that morally or physically. They have as much right to smoke as men have when you get right down to it. However, it had its effect, all this nervous excitement, all drawing on her physical energy; then going in there and sitting up and playing cards—you know there is some excitement—in that tobacco smoke, with a heavy dinner. She went in there and there was a jarring of the train—now then, I will come to that in a minute. The theory, however, is that she fell and bumped her head.

Now, they went to bed and slept. Slept until nearly noon the following day. She got up and then complained of this numb condition. It looks to me, gentlemen of the jury, as though it was just one of those temporary conditions that was brought on by the excitement of her trip and the con-

stant traveling, and it would only call for rest. The rest cure is all it needed.

Now, let's go a little farther. She got to Chicago. Now, mind you, no report was made to the trainmen of the condition until nearly noon of the next day. They were almost in Chicago. Now, when they got there Dr. Simonson—I think the doctor had helped her off the train. He was the local surgeon. Dr. Pierce was the chief surgeon. All they did was to just merely examine her. She went over to the other station. I think they call that the Dearborn Station, I think, the Santa Fe. Then she came on home.

She got to Grace Hospital and Dr. Sanders. Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, [fol. 429] didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never have said that she did have. But let me tell you: I did have a right to show to the jury that her permanent condition was not due to the conditions as existed until she had been treated by Dr. Geraghty under a mistaken diagnosis of the case by himself.

Now, what do we have? I said nothing about this, but if you will remember they introduced a sheet made up by Dr. St. Elmo Sanders made on the 29th day of September, 1925, showing on that day and on the 30th, the day following, he had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it, too, gentlemen. We know and the evidence of these physicians, medical men, show that iodide of potassium was the old remedy for a specific trouble; and right on there was a Wassermann test. That suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment.

Now, she was only in there from the 29th of September to the 9th of October, and from that time on when she went to Dr. Woody—until she went to Dr. Woody, she didn't have any doctor at all. She went on home. She had the rest cure. After she had the rest cure she got up and then consulted Dr. Woody. Dr. Woody treated her longer than anybody else. It is unfortunate for us that they didn't bring him here so we could cross examine him, but I don't blame them for it. I don't blame them for it.

Now, what is the next thing? She went to Dr. Geraghty and what did she say? She said that when Dr. Geraghty undertook to give her this treatment, which it is admitted is the same as salvarsan, administered in the ordinary way, that he said that it would do her good. In other words, gentlemen, he too had made a wrong diagnosis. And what did he do? For a long period of time—I forget how many times a week, but you will remember—he commenced injecting hypodermics a form of iodide of potassium, mercury and arsenic; and this poor girl went back to him and begged him to withhold that treatment because she was suffering so much and it was so disastrous.

What did it prove, gentlemen? That she had had any specific trouble? She would have responded to that treatment. But no, she didn't have it. That poison that had been sent through her body, that destroys that germ, found no germ to feed upon; and what did it do? It went through her whole system and commenced eating on anything. You [fol. 430] know mercury eats. You know arsenic is a deadly poison. And what was the result? It had to go through her, her circulation. It had to go through her entire body in order to get out. And it found an outlet. But, gentlemen, what did it do internally to this poor woman? I want you to think about that. What did it do internally to her, if it could do all those things to the skin, and to the face and to the eyes; what could it do to the brain, the nerves of the body? If it couldn't eat the germs it would eat something else. I want you to think about that.

Now, let's go to another point. I am going to be as brief as I can. The Court is going to tell, I think, that the burden is on the plaintiff in this case to show specific act of negligence on our part which was the proximate or direct cause of the injury sustained by her. Now, let's take that up. I understand—I believe everybody here is trying to tell the truth; I don't think anybody is doing anything else. We have in this situation, we have the two brakemen, the forward brakeman and the rear brakeman; we have the conductor, we have the Pullman conductor, we have the porter and the maid. They all say there was no unusual jar on that train that night. Now, as against that we have this situation: Imogene says that is the most extraordinary jar of her experience. That doesn't mean anything. She may

have never had another jar like that before. Myrtle, of course, said it was a violent jerk; that there was a checking of the train as though it stopped, because the evidence shows by the maid that they were going through Syracuse, New York, and this road runs right down through the main street of the town. They couldn't go through that town the same speed they had been going out in the country. They had to check down, and at that hour of the night, midnight or thereabouts, they had to check that train down in order to go through that city and avoid destroying lives, which necessitated cutting down the speed of the car. Now, that is the situation as far as that is concerned.

Now, we have here two young ladies. I will say to you I have known Imogene ever since she was a girl. I knew her mother, and a grander woman than her mother never lived. So you see I know the situation of her and I know her desire to tell the truth, and I believe Myrtle's desire was the same. Now then, they came in, as Imogene says; Myrtle's eyes were unusually bright, that showed a nervous excitement, you know, unusually bright; but they come into that car; there was a rocking of the car. She took hold of the curtain, I think, with her right hand as they passed through the [fol. 431] car. Now, they had been talking and laughing; their mind wasn't on any sudden jerks or stops. But all of a sudden there was a check of the car and it pitched her forward. Now, what was the effect? She had her right hand on this and it pitched her forward. The tendency is just like the cracking of a whip. When it pitched her forward, it would throw her face forward towards the upper berth and down to the side. Now, then, it pitched Imogene over, and of course she knew nothing of what happened, only that she picked Myrtle up off the floor. Now, that is the situation there. It is a question of whether she struck the berth or was it after she fell. That I don't know. I leave that to you to work out, because time is too short for me to go any further.

Now, what do we have? It is perfectly natural for two young ladies that are sitting there, standing there, when a sudden checking of the car precipitates them unexpectedly, to have an exaggerated idea of that situation. Probably in your own experience where something has happened to you, somebody pushed you from behind right quick, for a mo-

ment there is a startled sensation, there is an unusual mental activity, there is a tendency to exaggerate in your own mind. Now, you can tell that and you will swear to it before God as long as you live, as being the absolute truth, and yet as a matter of fact it is an exaggerated idea. Now, they have said—and this question is up to you—it was violent. Now, you understand girls and men ordinarily ride in the seats. Was there any evidence whatever that she had been standing up in an aisle when a train started to check? No, there was not. Why, if they had been in their berths or if it had been in the daytime in their seats, they would never have known anything about it. It would have been the ordinary checking of a train and that would have been the end of it.

Now, I understand, gentlemen of the jury, that the time is short, and I don't want—you have been very patient; I don't want to take and try to labor out something, because I believe you will remember the facts and coördinate them and get them together a good deal better in the jury room than I can bring them to you here. I merely call your attention to these things.

Now, so far as this maid is concerned, so far as the Pullman conductor is concerned, so far as the porter is concerned, what object would they have in undertaking to misstate or misrepresent? Now, they have alluded to that. What object would they have? Where would it benefit them?

[fol. 432] Now, another thing I don't see. Take the engineer and the fireman. They commented on that. The engineer and fireman are at the head of the train. This was the middle of the night. The train was going into Syracuse, New York, down the main street of the city, and Syracuse is a large city. Their minds were ahead. They were looking forward, and all they would do would be to act as they always had; and honestly, gentlemen of the jury, if he would come and get on the witness stand, either one of them get on the witness stand and say what the condition in that train was as to jar, etc., I wouldn't believe him, because he wouldn't know. Now, that is why they are not here. Why, what could they tell about it? You take an engineer. If you have ever ridden in an engine, as it goes down there, the man is of course busy, and he can only turn

his air according to his schedule; a little dial that is on the side. That is the situation. It is the usual and customary way. That is all he should do. What it does back there he doesn't know. And that is why they are not here.

Now, gentlemen, I am perfectly willing to leave this to you and I believe that you will try to go and be just and fair and try to reduce the facts in this case to a fair and just decision, under the instructions of the court, as you have been attentive to the testimony in this case.

I thank you.

Argument of Mr. Wickersham

Mr. Wickersham: May it please the court: Gentlemen: I have been practicing law for some 27 years, and during that time I have tried many cases in state and federal courts; and as this is the first case that I have tried before his honor I feel I would be remiss in my duty did I not say that in all my experience I have never tried a case where a court has handled it with such expedition, precision, knowledge of the law, courtesy and kindness, and I have rarely had the experience of trying a case before a jury that has paid more strict attention to the evidence with an evident desire to seek the truth than you men have.

My time is entirely too short to discuss this case as adequately as I would like. I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him and I know the obstacles that confront him as local counsel for an eastern [fol. 433] railroad, the defense in a case of which is prepared by a claim department and handed on to him to try. It is especially hard for him because he knows those two young women, and, as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he is required to follow the dictates of some claim department.

Mr. Marley: That I object to, your honor, as incompetent argument. No evidence of my following any dictates of any claim department.

Mr. Wickersham: It is obvious.

The Court: Counsel may draw inferences from facts as he sees them.

Mr. Marley: Note an exception.

To which action and ruling of the court the defendant in the case of Myrtle Johnson vs. New York Central Railroad Company, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Edward Johnson vs. New York Central Railroad Company, then and there at the time duly excepted and still excepts.

Mr. Wickersham: Now, let us understand. First, primarily, this case is one based upon negligence. Negligence consists of a duty and a breach of it. First, what is the duty of a railroad company to a passenger? To carry them safely; to exercise a high degree of care for that purpose. What was the breach in this case? The breach was in so manipulating and operating that train that it threw this woman with such force and violence as to tear her grip from that curtain and crash her head against that upper berth, throwing her down, rendering her unconscious, and catapulting the girl who sat upon the edge of the seat clear across diagonally to the rear window.

Now, what do you understand from these witnesses sent on here from New York as to the movement of that train? Let's get down to brass tacks. That there was no unusual movement; no movement at all of that kind.

Why, listen to what Mr. Marley says in his opening statement. It was written out by this court reporter here. "They went to bed and then Myrtle, the plaintiff's wife, [fol. 434] was undertaking to open her grip to get something out when there was a lurch of the train, and, as we understand it, her head was struck against the upper berth." A lurch of the train. Their own lawyer admitted it. He read the files in this case sent on from New York.

Now, then, another thing: They knew immediately the Pullman reservations, as you know from common sense, showing the names of the persons occupying the berths in that train. They knew of this case right away. Common sense tells you, from your experience of life, that all they had to do was to look there and get the names of the other people on that train. Did they get them? Did they bring them all here? No. Why? The reason is obvious. Why didn't they bring that engineer? You know why. I know

why. Why didn't they bring that Dr. Pierce who examined her? Listen to this: I say to you this man that was on this stand never did examine her, and that those two girls, whom this lawyer says he knows, told the truth. He says in his opening statement: "The local surgeon, doctor, of the New York Central Lines saw her and saw what the trouble was. He examined her and found no indication of any bruise, but he did find—he did find her in a highly hysterical condition." Listen. He. Not they. Not two of them. He. That is Pierce, the man whose name was written on that slip there that I showed to this court; he, the man whom they knew about a year ago and could have been brought here as a witness, and they didn't bring him. That is the man that knew it.

Now, I want to get some more things to you. You note that Mr. Chilcott said in his opening statement: "I only know from rumor what the defense in this case may be, but we will be able to meet it"; and just the moment that counsel for the defendant began to interrogate these witnesses with reference to the condition of the blood I made up my mind I would meet it right there. They never for one minute had an idea that we would put Dr. Geraughty on the stand, so that they couldn't come before this jury and say, "Why didn't you bring that man?" You mean to tell me when a man who knows all about arachnoids and pia mater and dura mater and all about those things, that he hadn't prepared this defense and worked it out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the [fol. 435] stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that [illegible] upon the brow of a decent woman——

Mr. Marley: If your honor please, there is no evidence of that kind, or any attempt on our part——

Mr. Wickersham: I say there is.

Mr. Marley: —to charge her with indecency, and I take exception to the argument of counsel along those lines.

The Court: The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn.

Mr. Marley: Note an exception.

To which action and ruling of the court the defendant in the case of Myrtle Johnson vs. New York Central Railroad, by its counsel, then and there at the time duly excepted and still excepts.

To which action and ruling of the court the defendant in the case of Edward Johnson vs. New York Central Railroad, by its counsel, then and there at the time duly excepted and still excepts.

The Court: But you must depend upon the testimony of the case for your decision.

Mr. Wickersham: But now in this eleventh hour, [repentant,] seeing the mistake he has made before twelve good men and true, what did he do? He comes before you and vouches for the character of those two young women, and then says, "I don't think she ever had any specific disease." That is his exact language made within fifteen minutes ago.

Think of it. And then attempting to prove that. "I don't think she ever had any specific disease."

Now, another thing I want to call to your attention, so that I may be helpful to you. That is this, so we may know the truth: These x-ray pictures were in this court on Monday. They show plain and clear that there is a thickening of the membrane of the skull, and they show that definitely, [fol. 436] positively; so testified to by [illegible] available to them, with all the x-ray men in [illegible]. Not a single bit of evidence do they produce. If those pictures didn't show that, why didn't he put a man on the stand? That is straight talk. That is something man to man. Why didn't you do it? If those pictures don't show that there is a cicatrix upon the brain, a scar tissue there, that renders

her helpless and hopeless for the rest of her life, why didn't you show it, in good faith, knowing these women as you know them? Why leave the inference to these twelve men here that there is something wrong about it?

Oh, I wish I had an hour to talk to you. "Life isn't life without hope; it is but a lingering torment, an image of death." "The memory of joy is not joy; sorrow's memory is sorry still." Think of it. Every day of that woman's life, from the time she arises in the morning, the constant realization, "I am no longer myself; I am but a wreck of my former self; I can't cook, cut my food without assistance and help; I can't do the things that life was given me for to do; I am this invalid; I am this nervous wreck; I cannot enjoy life." "Here I am a young woman 30-odd years of age; I can't walk, I can't engage in games, I can't do anything that makes life worth living. What for? Why has this been brought upon me? What is all the reason for it? Some engineer who had failed in his duty, who came upon a curve unexpectedly, slammed the brake on and checked that train, knocked that woman down. Is that any less wrong than a man in the signal tower who pulls the wrong lever and dashes one train into another and kills people and maims them? Is that any more legally wrong than it is for this engineer to hit into a curve—and he did hit into a curve. Look where he threw that woman, Imogene; over to the window, headlong; catapulted over there. That is what he did. And they hit that curve and then stopped, and then went on again. That is what happened. And I tell you it didn't happen when they were going into Syracuse, either. Listen to the maid, who says it happened at 12:30; listen to the man who knows the water level route, who talked about the time when they arrived in Syracuse. They were 25 minutes outside of Syracuse according to their own evidence.

Now, gentlemen, if there was one mistake that the plaintiff's lawyers in this case have made, it is that when my partner drew the petition in this case he only asked for $25,000. That is the one mistake, if any, that was made in this law suit, particularly for this woman. That is the [fol. 437] one mistake and the only mistake. And I ask you, as men good and true, who understand what life means, who understand what health means, above all other attri-

butes of human beings, to give to this woman every single penny that is asked. We ought to have asked for $50,000 instead of 25. I believe that it is a gross injustice for any juror to say, "Oh, well, it wasn't somebody killed or a leg cut off." I would rather have both of them cut off than to be suffering all my life with the tortures and the damnable affliction of life as she is, and the consciousness ever present, morning, noon and night, of this inability to do the ordinary things of life.

Is it any wonder that when that young woman took this stand in the very beginning of this trial and her mind was again brought to remember it that she burst into tears and sobbed? Is it any wonder that that is true?

Gentlemen, I wish I had longer. I feel that my duty to that poor woman is not in all respects fulfilled. The time is too short. But I thank you sincerely, and I hope that your deliberations in this case will bring happiness and some joy to this woman.

COURT'S CHARGE TO THE JURY AND EXCEPTIONS THERETO

The Court: Gentlemen of the jury, at the close of the argument of the attorneys and after the testimony of the witnesses it becomes the duty of the court to instruct you upon the law of this case, and then it will become your duty to apply that law to the fact.

Just as the court, for the purpose of the present trial, is the sole judge of what the law of the case is, so you are the sole judges of what the facts were; the sole judges as to the proper and right decision of the issues of fact. You are not responsible for what the law is, and the court is not responsible for what the law is; just as you take the law from the court, so the court in turn takes it from the statutes which have been enacted by the Congress of the United States and from the decisions of appellate courts of the United States, including that greatest of all tribunals, the Supreme Court of the United States. So far as the law of the case is concerned our only responsibility, yours and mine, is that we shall obey the solemn obligations we have taken; my obligation to correctly state the law to the jury, and yours faithfully to apply the law to the facts.

And yet I may say that it will not be difficult for either of us to follow the law, because I think that all men, all [fol. 438] thinking men, will agree that these rules of law that I shall state to you are in accordance with right and justice and common sense, and well they may be, because they are never, or most of them were not, declared in some single moment or single hour by some legislative body; they are the slow growth of centuries; the embodiment of the wisdom of our race, as that wisdom has been formulated into rules, changing and modifying as time goes by and new enlightenment comes to men; but the proven and tested wisdom of the past. And I think you will realize that just as I state these rules to you one by one. But whether you think they are right or not is a matter of no consequence, because it is our duty to apply the law as it is given us.

Now, we are trying two cases here, gentlemen of the jury, which by the order of the court have been consolidated; were consolidated by the court because he thought that thereby time could be saved and the labor of twelve other men who might be required to try one of the cases could be avoided, because, since the cases involve the same facts and the same situation, essentially, it was easy to combine them, to consolidate them, and to try them together.

But I shall first speak to you of the case of Myrtle Johnson against the New York Central Railroad Company; and what I shall say, until I indicate otherwise, is applicable to that case.

Mrs. Myrtle Johnson, the plaintiff's wife in this case, has brought an action against the New York Central Railroad Company in which she seeks to recover damages, alleging that her damages were $25,000, because of an injury alleged to have been received by her while riding as a passenger upon one of the trains operated by the defendant, being at that time in the state of New York, and in which she says, alleges, claims that the injuries referred to were caused by the negligence of the defendant. The defendant, in its answer, denies the allegations of the plaintiff's petition, and so the case is made, and so it is brought here for the court and jury to consider.

Now, gentlemen, having made that brief introductory statement, I begin to state to you the rules of law which are applicable in this case.

First, it is the law that a railroad company is not an insurer of the safety of its passengers. That means that one who is a passenger upon a railway train and who has been injured while a passenger is not entitled under the law to [fol. 439] recover damages from that company merely by showing that he was injured unless more is shown than that, and that because, as I have said, the railway company is not an insurer, not liable in any event to any person who may have been injured while a passenger. That is the first rule of law that I give you, and that you will bear in mind in this case.

Second, it is the law that a railway company which transports passengers for hire who have paid for their transportation is under the duty to exercise the utmost care upon its part to transport those passengers in safety and to carry them safely, and if it fails to exercise that degree of care, or, to state it differently, if it is negligent—and negligence means the absence of care—if it is negligent in that it has not exercised that degree of care which the law imposes upon it for the safe transportation of its passengers, and if as a direct result of that want of care or of that negligence a passenger is injured, then that passenger is entitled to damages from that company. That is the second rule of law which I give you and which you will keep in mind in this case.

Now, it is upon this second rule of law that the plaintiff in this case relies. She claims that while she was a passenger, having paid for her transportation, while she was riding as such passenger she was injured as a direct result of a sudden unusual lurching, jerking, surging movement of the train upon which she was riding, and that that unusual, extraordinary lurching, jerking and surging movement of the train was due to the negligence of the defendant in the operation of the train. That is what she claims. That is the theory of law, the rule of law, upon which she relies.

Gentlemen of the jury, the court instructs you that if you find and believe from a preponderance or greater weight of the credible testimony in this case that the plaintiff was a passenger upon one of the defendant's trains in the state of New York at the time and place mentioned in the evidence, that she had paid for her transportation, and that while she was riding as such passenger upon one of the

defendant's trains she was injured and that her injury was directly caused by an unusual, extraordinary lurching, jerking, surging movement of the train, if any, was caused, directly caused, by the negligence of the defendant, its agents and servants in charge of said train, or, to put it differently, by their failure to use that degree of care in the operation [fol. 440] of the train that the law imposed upon them, and which I have already stated to you, then in that event, if you find all of these things which I have enumerated, it is your duty to return a verdict for the plaintiff.

If, on the other hand, you do not find from a preponderance of the credible testimony in the case that the plaintiff was injured while a passenger who had paid for her transportation upon one of the defendant's trains, and that that injury was caused by an extraordinary, unusual lurching, jerking, surging movement of the train, and that such extraordinary, unusual surging, lurching, jerking of the train was caused by the defendant's negligence, then your verdict must be for the defendant.

I may amplify that, and do amplify it, by saying that if you find that her injury, if any, was caused by some other cause than a lurching or jerking of the train, your verdict must be for the defendant; or if you find that her injury, if any, was caused by a lurching or jerking of the train but that that lurching and jerking was not extraordinary and unusual but was necessarily incident to the ordinary operation of the train and was not caused by the negligence of the defendant, then your verdict must be for the defendant.

Further, your verdict must be for the defendant even although you may believe that the injury was caused, if you find there was an injury, by an unusual and extraordinary lurching and jerking of the train, provided you further find that such unusual and extraordinary lurching and jerking of the train, if any, was not caused by the negligence of the defendant or by its failure to use that degree of care in the operation of the train required by the law.

Such are the principal rules of law which you will bear in mind.

I come now to another matter, and it may be an important matter in this case,—to another branch of the law of the case. That is concerning the burden of proof in the case, to which reference has been made by the attorneys

upon both sides, anticipating, as they had a right to do, what the court would say upon that subject; but, as sometimes happens, not agreeing between themselves as to what the court would say.

Subject to a modification which I shall presently state to you, the burden of proof is upon the plaintiff to [fol. 441] prove his case by the preponderance of greater weight of the credible testimony in the case; and if he has failed to prove his case by the preponderance or greater weight of the credible testimony in the case the verdict of the jury must be for the defendant; and by the preponderance or greater weight of the credible testimony is not meant the greater number of witnesses, but that testimony that is the more convincing and satisfying to the minds of the jury. That is the general rule in all cases.

The modification is this, in this case: If the plaintiff in this case has proved that she was a passenger on the defendant's train at the time and place referred to in the testimony, that she had paid for her transportation, that she was injured while a passenger, that her injury was directly caused by an extraordinary and unusual lurching and jerking of the train or car upon which she was riding, then she does not need to go further and prove what specific negligence, if any, caused that unusual lurching and jerking of the train, because the law presumes that an unusual, extraordinary lurching and jerking of the train or car upon which the passenger was riding was due to the negligence of the defendant, its agents and servants in charge of and operating the train; was due to the failure upon their part to exercise that degree of care which the law requires of a railroad company.

But, gentlemen, that presumption is not a conclusive presumption. That is a rebuttable presumption. When the plaintiff has proved those things he has made what we speak of as a prima facie case, and since everybody else in this case has used words that nobody understood but themselves, I suppose I may use such a term. What is meant by that is that when she has proved those things then she has made a case which, if there is nothing shown to the contrary, would entitle her to a verdict; but it is a rebuttable presumption. That is to say, the law says to the de-

fendant "you can show, if you have testimony to show, that this extraordinary and unusual lurching of the train, if the evidence shows that there was one, was not due to your negligence; was not due to any carelessness upon the part of the operators of the train; and if you do show that then you are entitled to a verdict, and the presumption vanishes away."

Gentlemen of the jury, of course, as I have already said to you, if there was no lurching and jerking at all then the verdict of the jury must be for the defendant. If the plaintiff was caused to fall from some other cause, as [fol. 442] stumbling over a suit case or against her companion, and not by an unusual lurching or jerking of the train, then your verdict must be for the defendant. If from all evidence in the case you believe that, even though there was an unusual lurching or jerking of the train, it was not caused by the negligence of the defendant, then your verdict must be for the defendant.

Now, gentlemen, what I have thus stated to you—and I think that an oral instruction is far more capable of being followed and understood than a written one—at the risk of some repetition I will restate to you by reading to you certain instructions that have been requested by the parties in the case; but these instructions are the court's instructions just as much as any other part of the charge.

Gentlemen of the jury, the court instructs the jury that if you find and believe from the evidence that on or about the 27th day of September, 1925, plaintiff boarded the car and train referred to in evidence, and that she paid to defendant her fare and became a passenger on said train and car, and that said train and the car in which plaintiff was riding were being operated by defendant, then it became the duty of the defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely; and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any; and if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly

violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the act that there was no negligence on its part and that the injuries, if any, sustained by plaintiff were occasioned by an inevitable accident or by some cause which such highest degree of care could have avoided."

Mr. Marley: Has that a number, your Honor?

The Court: That is plaintiff's requested instruction No. 1.

Defendant's Requested Instruction Lettered "H"

[fol. 443] "The court instructs the jury that the defendant, New York Central Railroad Company, was not an insurer of the safety of Myrtle J. Johnson as a passenger on one of its trains mentioned in the evidence, neither is it responsible to her for any injuries, if any she sustained, while standing in the aisle of the sleeper mentioned in the evidence; by the lurching of that car."

That is provided, gentlemen—this I interpolate—it was not by an extraordinary and unusual lurching and jerking of the car, as I have elsewhere defined it and discussed it in my charge.

"The shaking or jostling of such car is an ordinary incident to railroad travel as a consequence of the operation of counteracting forces and is to be expected to occur on such trains and was assumed by the plaintiff as a passenger."

Instruction Lettered "G"; Requested Instruction Lettered "G"; Defendant's Requested Instruction

"The court instructs the jury the negligence of the defendant, New York Central Railroad Company, can not be inferred from the swaying and lurching movements of the car which necessarily attend the proper and careful operations of the fast passenger train in which Myrtle J. John-

son was riding as such movements are risks which said Myrtle J. Johnson assumed as a passenger."

That is, if the rolling and jerking effect was a necessary incident to the transportation of the plaintiff, it was not accompanied by any negligence upon the part of the defendant.

Instruction Lettered "I," Asked by the Defendant

"The court instructs the jury that if you find and believe from the evidence that there was no sudden and violent lurching of the sleeping car in which plaintiff Myrtle J. Johnson was riding then your verdict must be for the defendant, New York Central Railroad Company, regardless of the fact that she bumped her head."

Instruction Lettered "J"

"The court further instructs the jury that although you may find and believe from the evidence there was a sudden and violent lurching of the sleeping car in which plaintiff Myrtle J. Johnson was riding, yet if you further find such lurching was necessarily incident to the operation of the fast train on which she was riding then your verdict must [fol. 444] be for the defendant, New York Central Railroad Company, although you believe from the evidence such lurching caused her to bump her head."

"The court instructs the jury that medical men have been called as experts to give opinions as to the condition of the plaintiff Myrtle J. Johnson. Some of these opinions are based on what are designated hypothetical questions. If the evidence introduced upon this trial shows the acts, conduct and condition of plaintiff Myrtle J. Johnson, to be as stated in such hypothetical questions, then the opinion testimony of medical men of large experience, based upon such questions, may be given such weight and value as you may believe them entitled to. If, however, the evidence does not sustain the supposed state of facts presented in such hypothetical questions asked such medical witnesses, then you should attach no weight whatever to the answers of the medical experts founded thereon. The value of such

opinions depends upon whether or not the facts upon which they are based are the facts found by the jury to be the facts established by the evidence. You should also give the opinions of such medical witnesses as have testified from personal knowledge such weight as you believe them fairly entitled to."

Now, gentlemen, just a brief reference to the facts in this case; and it will be a brief reference, and it is introduced by saying to you that you are the sole judges of the facts. You must depend entirely upon your own recollection of what the testimony has been, not upon the recollection of any other person, court or counsel. Whatever I say to you concerning the facts is in no sense binding upon you and must not be considered by you as in any sense binding.

While the testimony has taken two days and the attorneys in the case have tried the case expeditiously on their part, it has revolved about two subjects only, as I view it; one the cause of the plaintiff's injury, the other the extent and nature of her injury.

The testimony concerning the cause of the plaintiff's injury, if it had all been presented at one time, would not have taken more than five minutes, because most of the testimony in the case was concerning the nature of the injury. The testimony concerning the cause of the injury, of course, you gentlemen, remember as well as I, among other reasons because, as I have said, it was all so brief and so short upon that subject upon both sides.

Upon the part of the plaintiff, the testimony of the witnesses was—and there were only two witnesses for the [fol. 445] plaintiff who testified concerning that subject—that the injury of the plaintiff was caused by a lurching, jerking movement of the train as if the train were suddenly checked or stopped. The testimony of these witnesses was, each of them, that she had had experience in traveling. She outlined what that experience had been. It totaled, of course, many thousands of miles as to each passenger during the period of her life; that she was familiar with the ordinary lurches and jerkings of the trains incident to the ordinary movement of trains, and that this particular lurching and jerking was more extraordinary and more unusual than either of them had ever experienced.

In addition to their oral testimony there was the evidence of the physical facts which they described to you, which of course has a bearing upon what force was exerted by the lurching and jerking of the train at the time, and some indication that may be gathered from physical facts as to what was the nature of such lurching and jerking and what was its extent and what was its violence. That was the testimony upon that subject by the plaintiff, as I recall it. You may recall more of it than I do, or you may recall it differently.

Upon the part of the defendant on the same subject, the testimony of the operatives of the train—that is to say, of the servants and agents of the operators who were on the train—was to the effect that they did not recall any lurch or jerk of the train at all at the time or about the time of this injury. Morever, they testified positively that there was no such lurch or jerk of the train. There was testimony, morever, as to the condition of the road bed; that the railroad was ballasted; that it was practically an absolutely level track; that the curves in its were extremely small, if any, not to exceed in any case 20 per cent., I think, perhaps 15 per cent., and other testimony concerning the nature and character of the track upon which this train was operated; that there were four tracks, one for trains going west and trains going east; separate tracks for the freight trains and the passenger trains, all of which bears upon the nature of the tracks and the character of the equipment that was used. There was also upon the part of the defendant's witnesses testimony as to statement made by the plaintiff herself as to the cause of her injury; one, as I recall it, that she said she was injured by falling over a suit case, another, as I recall it, made to a different person, that she was injured by falling against or upon her companion. Such was the testimony. I think I have, and certainly I have tried, fairly to state it from both sides as to this issue, which perhaps I may speak as the principal issue of the fact to be [fol. 446] determined by you; what was the cause of the injury; was it or was it not an extraordinary and unusual lurching and jerking of the train. That is for you to decide and concerning that issue I express no opinion whatever, nor do I express any opinion concerning the nature and extent of the injury. You have heard the testimony upon

that subject, it has been full, and you can pass upon it. I could not possibly assist you by reviewing it at all.

Gentlemen of the jury, if your verdict is for the plaintiff Myrtle J. Johnson, then of course it will be necessary for you to fix what damages you shall award her, and for that the law provides a standard. If your verdict is for the plaintiff, in assessing her damages you will take into consideration the nature and extent of her injuries, if any, received as a result of the negligence of the defendant, if any, pain and suffering, if any, which she has experienced as shown by the evidence by reason of said injuries and which she will suffer hereafter as shown by the evidence by reason of said injuries, whether the injuries are permanent or are not permanent, to what extent, if any, she has been deprived from earning an income by reason of the injuries and to what extent, if any, as shown by the evidence, she will be in the future deprived from earning money at her usual or any other vocation, as shown by the evidence in the case; expenses, if any, to which she has been subjected, or may hereafter be subjected, as shown by the evidence in the case, for medical attendance and assistance, but not to exceed the amount testified to in the evidence for that purpose, together with all the facts and circumstances in evidence relating to the injuries, if any, received by the plaintiff and directly caused by the negligence of the defendant, if any; and you will award her such damages as will reasonably compensate her for her injuries, if any, as shown by the evidence in the case and as caused by the negligence of the defendant, if any, as shown by the evidence.

Now, gentlemen, so far I have discussed the case of Myrtle Johnson against the defendant railroad company. It will take only a few moments to discuss the other case.

Mr. Marley: If the court please, you are going to charge now as to the Edward Johnson case?

The Court: Yes.

Mr. Marley: Before you go into that, I desire to note exceptions in this case, so as to avoid confusion of exceptions. [fol. 447] The Court: Well, I will be very brief in this matter concerning Edward Johnson, and at the close of my charge, I will give counsel on both sides the usual opportunity to state their exceptions and to note them.

Mr. Marley: All right.

The Court: Gentlemen, if your verdict should be for the defendant New York Central Railroad Company in the case of Myrtle Johnson against the New York Central Railroad Company, that would dispose also of the other case, because if the plaintiff Myrtle Johnson is not entitled to recover, then the plaintiff Edward Johnson is not entitled to recover, and all I have said concerning the matter of negligence and all that I have said heretofore relative to whether the defendant is liable to the plaintiff in the case of Myrtle Johnson against the defendant will be considered by you in that connection in passing upon the case of Edward Johnson against the New York Central Railroad Company.

But if you should find for the plaintiff Myrtle Johnson then you will consider the case may consider the case of Edward Johnson against the New York Central Railroad Company, and the other court instructs you that if you find and believe from the evidence that plaintiff Edward H. Johnson is now and was on the 27th day of September, 1925, the husband of Myrtle J. Johnson, and that on or about the 27th day of September, 1925, said Myrtle J. Johnson boarded the train and car referred to in evidence—strike all that out. I was reading the wrong instruction.

Mr. Marley: Then, that is all withdrawn, is it, your honor?

The Court: That is all withdrawn.

Mr. Marley: All right.

The Court: The court instructs the jury that plaintiff Edward H. Johnson is entitled to the society, health, strength and usefulness of his wife, Myrtle J. Johnson, unimpaired by injury, as tre result of the negligence, if any, of defendant, and that the law does not furnish us any exact standard by which to measure the value of plaintiff's said wife's society; you are, therefore, instructed that if your verdict is for the plaintiff, Edward H. Johnson, then in estimating and determining his damages, if any, the jury will take into consideration the nature and extent of the injuries, if any, sustained by plaintiff's said wife, Myrtle J. Johnson, which you find and believe from the evidence to be the direct result of the negligence of the defendant as submitted to you in other instructions herein; whether or [fol. 448] not such injuries, if any, are permanent; any

impairment, if any, of her ability to work and assist plaintiff; and you are further instructed that the value of the society, aid and affection of Mrs. Johnson to her husband, plaintiff herein, must be left to the enlightened judgment of the jury. By the term "society," as is here used is meant the capacity for usefulness, aid and comfort as the wife possessed at the time of her injury, if any, and your entire award, if any, should be stated in one sum.

Mr. Marley: What number is that instruction?

The Court: This is plaintiff's requested instruction No. 3. So if your verdict is for the plaintiff, Edward H. Johnson, that will be the measure of the damage to be awarded to him. You cannot find for him unless you find from the testimony that at that time he was the husband of the plaintiff Myrtle J. Johnson, at the time of the alleged injury and now; that she was injured as a direct result of the negligence of the defendant, as I have previously defined and gone into that matter and instructed you concerning that matter in her case, and that as a result of her injuries, he suffered damages in the matters to which I have referred in the instruction numbered 3 which I have just read to you.

Gentlemen of the jury, in passing upon disputed issues of fact and questions of fact, of course, it is for the jury to weigh the testimony and the credibility of the witnesses. You are the sole judges of the weight and value to be given to the testimony, and you are the sole judges of the credibility of the witnesses; but the law again furnishes to the jury certain aids and helps in this connection, each of them the result of experience of men during generations of time.

In passing upon the weight and value to be given to the testimony of a given witness, credibility of that witness, you have a right to take into consideration the conduct and demeanor, appearance and manner of the testifying of the witness, just as you do in the ordinary affairs of life. If someone relates to you an incident concerning which you must make a decision, you consider his manner, his conduct, his appearance, the way he describes it, the frankness or the absence of frankness, in measuring the value of what he has said to you. [Against,] you may take into consideration the interest of the witness, if any, in the outcome

of the case, just as you do in the ordinary judgments of [fol. 449] life. You consider the interest of the witness in the outcome of the matter concerning which he is speaking to you.

Again, you will take into consideration the reasonableness, the probability, of the witness' testimony; whether it is consistent with human experience or contrary to human experience, just as you do, again, in the ordinary affairs of life. When one relates to you a matter, you consider in passing upon the weight that you shall give to that relation whether it is reasonable or probable; whether it is consistent with human experience or not.

Again, you will take into consideration the opportunity of the witness to know the facts concerning which testimony is given; the opportunity of the witness to recall—or the reasonableness, I should say, the reasonableness of the witness' ability to recall or not to recall the facts concerning which testimony is given just as you do, again, in the ordinary affairs of life. If one is discussing some event to you and you have to decide whether that is a truthful discussion or not, naturally you take into consideration what opportunity that person had to see the thing which he describes; whether his attention was attracted to it or was not attracted to it at the time; when, if ever, his attention was again called to the matter, and all of those things in the ordinary affairs of life you take into consideration, and so here that is the standard which the law gives you.

You may take into consideration, as I say, the opportunity of the witness to know the facts concerning which he or she gives testimony. All of these things you may take into consideration in passing upon the weight and value that you are to give to the testimony of any witness. All of these things and all of the facts and circumstances in evidence in the case; and you will give to the testimony of each witness just that value and weight which you believe it is entitled to under the instructions which I have given you; and if you find that any witness has wilfully sworn falsely to any material fact in testimony then you are at liberty to disregard the whole or any portion of such witness' testimony.

Does the plaintiff desire to except to or to request additional instructions?

Mr. Wickersham: No, sir.

The Court: Does the defendant desire to request additional instructions or to except to those given by the court? [fol. 450] Mr. Marley: If the court please, I would ask the jury—charge them to take into consideration the relationship of the parties testifying to the plaintiffs in the case.

The Court: Gentlemen, in passing upon the weight and value to be given to the testimony and the credibility of the witnesses, in addition to the matters to which I have made reference you will also take into consideration the relationship of the parties to the plaintiff and defendant in the case.

Mr. Marley: Now, I desire to take exception to the portion of the charge substantially as follows:

"The court instructs the jury that if you find and believe from the evidence that on or about the 27th day of September, 1925, plaintiff's wife, boarded the car and train referred to in evidence, and that she paid to defendant her fare and became a passenger on said train and car, and that said train and car in which plaintiff's wife riding was being operated by defendant, then it became the duty of the defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff's wife safely; and a failure if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any; and if you find and believe from the evidence that the car in which plaintiff's wife was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff's wife was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defense, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by the plaintiff's wife were so occasioned by an inevitable accident or by some

cause which such highest degree of care could have avoided."

The Court: Very well, you may note the exception.

To which action and ruling of the court in so instructing the jury as requested by plaintiff and in giving to the jury plaintiff's said requested instruction, defendant in the case of Edward H. Johnson vs. New York Central Railroad Company, by its counsel then and there at the time duly excepted and still excepts.

[fol. 451] Mr. Marley: Now, then, on the question of burden of proof, your honor spoke of a modification of the usual rule as to that, and I desire to take an exception to that portion of modification, as follows:

"Subject to a modification which I shall presently state to you, the burden of proof is upon the plaintiff to prove her case by the preponderance or greater weight of the credible testimony in the case; and if she has failed to prove her case by the preponderance or greater weight of the credible testimony in the case, the verdict of the jury must be for the defendant; and by the preponderance or greater weight of the credible testimony is not meant the greater number of witnesses, but that testimony that is the more convincing and satisfying to the minds of the jury. That is the general rule in all cases."

And then in making the following modification, to wit:

"If the plaintiff in this case has proved that she was a passenger on the defendant's train at the time and place referred to in the testimony, that she had paid for her transportation, that she was injured while a passenger that her injury was directly caused by an extraordinary and unusual lurching and jerking of the train or car upon which she was riding; then she does not need to go further and prove what specific negligence, if any, caused that unusual lurching and jerking of the train, because the law presumes that an unusual, extraordinary lurching and jerking of the train or car upon which the passenger was riding was due to the negligence of the defendant, its agents and servants in charge of and operating the train; was due to the failure

upon their part to exercise that degree of care which the law requires of a railroad company."

To which action and ruling of the court in making said modification in the charge to the jury, the New York Central Railway Company, in the case of Edward H. Johnson vs. New York Central Railroad Company, then and there excepted at the time and still excepts.

Mr. Marley: Now, your honor, also read plaintiff's instruction number 1, as a part of the charge to the jury and I desire to except to that instruction number 1 that you read to the jury.

Mr. Wickersham: May I ask counsel to indicate the point in that whole instruction; what part of it is wrong?

[fol. 452] The Court: Well, you may make your exceptions as you see fit, Mr. Marley, and if you don't make it sufficiently you will have to bear the responsibility.

Mr. Marley: Let me see the instruction. I will read the exact part which I have in mind. This part:

"Then it became the duty of defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely, and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if you so find, from such negligence, if any."

To which action of the court in so charging the jury in the case of Edward H. Johnson vs. New York Central Railroad Company, the New York Central Railroad Company then and there excepted and still excepts.

Now, I except to that and this:

"And if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked, and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence on the defendant and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that

there was no negligence on its part and that the injuries, if any, sustained by plaintiff were occasioned by an inevitable accident, or by some cause which such highest degree of care could have avoided."

To which action of the court in so charging the jury the New York Central Railroad Company, in the case of Edward H. Johnson vs. New York Central Railroad Company, then and there excepted and still excepts.

Now, we except to that, as to the jerk and the burden.

The Court: Very well.

Mr. Marley: Which is in substance as follows:

"Gentlemen of the Jury: The Court instructs you that if you find and believe from a preponderance or greater weight of the credible testimony in this case that the plaintiff's wife was a passenger upon one of the defendant's trains in the state of New York at the time and place mentioned in the evidence, that she had paid for her transportation, and that while she was riding as such passenger upon one of the defendant's trains she was injured and that her injury was directly caused by an unusual, extraordinary lurching, jerking, surging movement of the train, and that such unusual, extraordinary surging, lurching, jerking movement of the train, if any, was caused, directly caused by the negligence of the defendant, its agents and servants in charge of said train, or to put it differently, by their failure to use that degree of care in the operation of the train that the law imposed upon them, and which I have already stated to you, then in that event if you find all of these things which I have enumerated, it is your duty to return a verdict for the plaintiff."

[fol. 453]

To which action and ruling of the court in so charging the jury, the defendant New York Central Railroad Company, in the case of Edward H. Johnson vs. New York Central Railroad Company, then and there excepted and still excepts.

Now, then, your honor made an interpolation there as to the defendant's instruction that you lettered "H," an oral one.

The Court: Yes.

Mr. Marley: I desire to except to that interpolation if your Honor please.

The Court: Very well.

Mr. Marley: Except to that part as follows:

"The Court instructs the jury that the defendant, New York Central Railroad Company, was not an insurer of the safety of Myrtle J. Johnson as a passenger on one of its trains mentioned in the evidence, neither is it responsible to her for any injuries, if any [*sue*] sustained, while standing in the aisle of the sleeper mentioned in the evidence; by the lurching of that car."

By modifying it as follows:

"That is provided, gentlemen—this I interpolate—it was not by any extraordinary and unusual lurching and jerking of the car, as I have elsewhere defined in and discussed it in my charge."

To which action of the court in modifying said defendant's instruction, the New York Central Railroad Company, in the case of Edward H. Johnson vs. New York Central [fol. 454] Railroad Company, then and there excepted and still excepts.

Mr. Marley: Now, I desire to except to that portion of the instruction as to the assessment of damages of the plaintiff Edward H. Johnson, as follows:

"The court instructs the jury that plaintiff Edward H. Johnson is entitled to the society, health, strength, and usefulness of his wife, Myrtle J. Johnson, unimpaired by injury as the result of the negligence, if any, of defendant, and that the law does not furnish us any exact standard by which to measure the value of plaintiff's said wife's society; you are therefore, instructed that if your verdict is for the plaintiff Edward H. Johnson, then in estimating and determining his damages if any, the jury will take into consideration the nature and extent of the injuries, if any, sustained by plaintiff's said wife, Myrtle J. Johnson, which you find and believe from the evidence to be the direct result of the negligence of the defendant as submitted to you in other instructions herein; whether or not such injuries, if any, are permanent; any impairment, if any, of her

ability to work and assist plaintiff; and you are further instructed that the value of the society, aid and affection of Mrs. Johnson to her husband, plaintiff herein, must be left to the enlightened judgment of the jury. By the term 'society' as is here used is meant the capacity for usefulness, aid and comfort as the wife possessed at the time of her injury, if any, and your entire award, if any, should be stated in one sum."

Mr. Marley: What number is that instruction?

The Court: "This is plaintiff's requested instruction No. 3. So if your verdict is for the plaintiff Edward H. Johnson, that will be the measure of the damages to be awarded to him. You cannot find for him unless you find from the testimony that at the time he was the husband of the plaintiff Myrtle J. Johnson, at the time of the alleged injury and now; that she was injured as a direct result of the negligence of the defendant, as I have previously defined and gone into that matter and instructed you concerning that matter in her case, and that as a result of her injuries he suffered damages in the matters to which I have referred in the instruction number 3 which I have read to you."

To which action and ruling of the court in so charging the jury the New York Central Railroad Company, in the case of Edward H. Johnson Plaintiff vs. New York Central [fol. 455] Railroad Company, then and there excepted and still excepts.

Mr. Marley: Now, I desire to take exception to the portion of the charge as follows:

"The court instructs the jury that if you find and believe from the evidence that on or about the 27th day of September, 1925, plaintiff boarded the car and train referred to in evidence, and that she paid to defendant her fare and became a passenger on said train and car, and that said train and the car in which plaintiff was riding was being operated by defendant, then it became the duty of the defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely; and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if

you so find, from such negligence, if any; and if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly violently and unusually surged, lurched, jerked, jolted, tilted and rocked and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defense, and the burden of proof is case upon the defendant to rebutt this presumption of negligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by the plaintiff were so occasioned by an inevitable accident or by some cause which such highest degree of care could have avoided."

The Court: Very well, you may note the exception.

To which action and ruling of the court in so instructing the jury as requested by plaintiff and in giving to the jury plaintiff's said requested instruction, defendant in the case of Myrtle J. Johnson vs. New York Central Railroad Company, by its counsel then and there at the time duly excepted and still excepts.

Mr. Marley: Now, then, on the question of burden of proof, your Honor spoke of a modification of the usual rule as to that, and I desire to take an exception as to that portion of modification, as follows:

Subject to a modification which I shall presently state to you, the burden of proof is upon the plaintiff to prove her [fol. 456] case by the preponderance or greater weight of the credible testimony in the case; and if she has failed to prove her case by the preponderance or greater weight of the credible testimony in the case, the verdict of the jury must be for the defendant; and by the preponderance or greater weight of the credible testimony is not meant the greater number of witnesses but that testimony that is the more convincing and satisfying to the minds of the jury. That is the general rule in all cases.

And then in making the following modification, to-wit:

"If the plaintiff in this case has proved that she was a passenger on the defendant's train at the time and place

referred to in the testimony, that she had paid for her transportation, that she was injured while a passenger, that her injury was directly caused by an extraordinary and unusual lurching and jerking of the train or car upon which she was riding, then she does not need to go further and prove what specific negligence, if any, caused that unusual lurching and jerking of the train, because the law presumes that an unusual, extraordinary lurching and jerking of the train or car upon which the passenger was riding was due to the negligence of the defendant, its agents and servants in charge of and operating the train; was due to the failure upon their part to exercise that degree of care which the law requires of a railroad company."

To which action and ruling of the court in making said modification in the charge to the jury the New York Central Railroad Company in the case of Myrtle J. Johnson vs. New York Central Railroad Company then and there excepted at the time and still excepts.

Mr. Marley: Now, your honor, also read plaintiff's instruction number 1, as a part of the charge to the jury, and I desire to except to that instruction number 1 that you read to the jury.

Mr. Wickersham: May I ask counsel to indicate the point in that whole instruction; what part of it is wrong?

The Court: Well, you may make your exceptions as you see fit, Mr. Marley, and if you don't make it sufficiently you will have to bear the responsibility.

Mr. Marley: Let me see the instruction. I will read the exact part which I have in mind. This part:

[fol. 457] "Then it became the duty of defendant to exercise the highest degree of care practicable among prudent, skillful and experienced men in that same line of business to carry plaintiff safely, and a failure, if any, of the defendant to use such highest degree of care would constitute negligence on its part and defendant would be responsible for all injuries, if any, directly resulting, if you do find, from such negligence, if any."

To which action of the court in so charging the jury the New York Central Railroad Company in the case of Myrtle

J. Johnson vs. New York Central Railroad Company then and there excepted and still excepts.

Now, I except to that, and this:

"And if you find and believe from the evidence that the car in which plaintiff was riding, if you find and believe she was a passenger thereon, suddenly, violently and unusually surged, lurched, jerked, jolted, tilted and rocked and plaintiff was injured thereby, if so, then the presumption is that it was occasioned by some negligence of the defendant and the burden of proof is cast upon the defendant to rebut this presumption of nigligence and establish the fact that there was no negligence on its part and that the injuries, if any, sustained by plaintiff were occasioned by an inevitable accident, or by some cause which such highest degree of care could have avoided."

To which action of the court in so charging the jury the New York Central Railroad Company in the case of Myrtle J. Johnson vs. New York Central Railroad Company then and there excepted and still excepts.

Now, we except to that, as to the jerk and the burden.

The Court: Very well.

Mr. Marley: Which is as follows:

"Gentlemen of the jury: The Court instructs you that if you find and believe from a preponderance or greater weight of the credible testimony in this case that the plaintiff was a passenger upon one of the defendant's trains in the state of New York at the time and place mentioned in the evidence, that she had paid for her transportation, and that while she was riding as such passenger upon one of the defendant's trains she was injured and that her injury was directly caused by an unusual, extraordinary lurching, jerking, surging movement of the train, and that such unusual, extraordinary surging, lurching, jerking movement of the [fol. 458] train, if any, was caused, directly caused by the negligence of the defendant, its agents and servants in charge of said train, or, to put it differently, by their failure to use that degree of care in the operation of the train that the law imposed upon them, and which I have already

stated to you, then in that event, if you find all of these things which I have enumerated, it is your duty to return a verdict for the plaintiff."

To which action and ruling of the court in so charging the jury, the defendant, New York Central Railroad Company in the case of Myrtle J. Johnson vs. New York Central Railroad Company then and there excepted and still excepts.

Now, then, your honor made an interpolation there as to the defendant's instruction that you lettered "H," an oral one.

The Court: Yes.

Mr. Marley: I desire to except to that interpolation, if your honor please.

The Court: Very well.

Mr. Marley: Except to that part as follows:

"The Court instructs the jury that the defendant, New York Central Railroad Company, was not an insurer of the safety of Myrtle J. Johnson as a passenger on one of its trains mentioned in the evidence, neither is it responsible to her for any injuries, if any she sustained, while standing in the aisle of the sleeper mentioned in the evidence by the lurching of that car."

By modifying it as follows:

"That is provided, gentlemen—this I interpolate—it was not by any extraordinary and unusual lurching and jerking of the car, as I have elsewhere defined in and discussed it in my charge."

To which action of the court in modifying said defendant's instruction, the New York Central Railroad Company in the case of Myrtle J. Johnson vs. New York Central Railroad Company then and there excepted and still excepts.

Now, I desire to except to that portion of the instruction as to the assessment of damages of the plaintiff Myrtle J. Johnson, as follows:

"Gentlemen of the jury, if your verdict is for the plaintiff Myrtle J. Johnson, then of course it will be necessary for [fol. 459] you to fix what damages you shall award her, and

for that the law provides a standard. If your verdict is for the plaintiff, in assessing her damages, you will take into consideration the nature and extent of her injuries, if any, received as a result of the negligence of the defendant, if any, pain and suffering, if any, which she has experienced as shown by the evidence by reason of said injuries, and which she will suffer hereafter as shown by the evidence by reason of said injuries, whether the injuries are permanent or are not permanent, to what extent, if any, she has been deprived from earning an income by reason of the injuries, and to what extent, if any, as shown by the evidence, she will be in the future deprived from earning money at her usual or any other vocation, as shown by the evidence in the case; expenses, if any, to which she has been subjected or may hereafter be subjected, as shown by the evidence in the case, for medical attendance and assistance, but not to exceed the amount testified to in the evidence for that purpose, together with all the facts and circumstances in evidence relating to the injuries, if any, received by the plaintiff and directly caused by the negligence of the defendant, if any; and you will award her such damages as will reasonably compensate her for her injuries, if any, as shown by the evidence in the case, and as caused by the negligence of the defendant, if any, as shown by the evidence."

To which action and ruling of the court in so charging the jury, the New York Central Railroad Company in the case of Myrtle J. Johnson vs. New York Central Railroad Company then and there excepted and still excepts.

The Court: Gentlemen of the jury, you will take to the jury room with you two forms of verdict in each of the two cases which are submitted to you. For example, in the case of Myrtle J. Johnson against the New York Central Railroad Company, if your verdict should be for the plaintiff you will use this form, signed by one of your number as foreman whom you will elect:

"We, the jury find the issues in favor of the plaintiff and against the defendant, and assess plaintiff's damages in the sum of blank dollars."

(Signed) —— ——, Foreman.

Had you some other exceptions?

Mr. Marley: Your honor please, I want to have an understanding, there being two cases combined, your honor will note separate exceptions in each case.

[fol. 460] The Court: Yes, the reporter will note separately as to each case the exceptions made by the defendant. I resume my reference to the forms——

Mr. Marley: I beg your pardon for interrupting, but I wanted to get it before the jury retired.

The Court: Yes.

If in that case, the case of Myrtle J. Johnson against the New York Central Railroad Company, your verdict is for the defendant you will use this form:

"We, the jury find the issues in favor of the defendant and against the plaintiff," signed by one of your number as foreman. There are similar forms to be filled out in the same way in the case of Edward H. Johnson against the New York Central Railroad Company.

Gentlemen, may I conclude by thanking you for your careful attention to this case, and by thanking the attorneys on both sides for the lawyer like and gentlemanly manner in which the case has been tried.

You will now retire to the jury room to consider your verdicts.

(Whereupon the jury retired.)

I, ——— ———, do hereby certify that I took down in shorthand the evidence introduced at the trial of said consolidated causes, the rulings of the court and the exceptions allowed, and transcribed the same, and that the above and foregoing bills of exceptions are a true and accurate transcript of my shorthand notes as taken by me upon the trial of said causes, numbered 6280 entitled Edward H. Johnson vs. New York Central Railroad Company and No. 6300 entitled Myrtle J. Johnson vs. New York Central Railroad Company.

Witness my hand on this the — day of June, 1927.

——— ———, Reporter.

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL

We have examined the above and foregoing consolidated bills of exception in case No. 6299, Edward H. Johnson, Plaintiff, vs. New York Central Railroad Company, Defendant, and case No. 6300, Myrtle J. Johnson, plaintiff vs. New York Central Railroad Company, defendant, hereto-
[fol. 461] fore set out, and find that the same contains all the evidence introduced at the consolidated trial of said causes; all the rulings of the Court therein; all of the exceptions allowed, and each and every matter therein contained is true and correct and we agree that the above consolidated bill of exceptions shall be filed as the Bill of Exceptions in both of said causes.

Witness our hands this the 20 day of July, 1927.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Plaintiff. Marley & Reed, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE

The above and foregoing bills of exception contains all the evidence introduced at the trial of said consolidated causes, all the rulings of the Court, all of the exceptions allowed and each and every matter therein contained is true and correct and the same is hereby Signed, Sealed, Certified and Allowed as full, true and complete bills of exception in and for said two consolidated causes and it is ordered to be filed as a record in both of said causes and it is hereby made a part of the records in said consolidated causes numbered and entitled as above. This 21 day of July, 1927.

Merrill E. Otis, United States District Judge, who presided at the trial of said cause.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS AND BILL OF EXCEPTIONS IN CAUSE NO. 6299—FILED JULY 21, 1927

It is hereby stipulated and agreed by and between Edward H. Johnson, the above named plaintiff and the New York Central Railroad Company, a corporation, the above named defendant, by and through their respective attorneys, that photographic prints of plaintiff's exhibits 5, 6, 7, 8, 9 and 10 may be inserted in the Bill of Exceptions and that the original x-ray films will be filed with the clerk of the court and by him transmitted with his record to the United States Circuit Court of Appeals for the Eighth Circuit, for the inspection thereof by the said Circuit Court of Appeals, and it is further agreed by the respective parties that as this cause was by the court consolidated for trial with and was tried with cause No. 6300 entitled Myrtle J. Johnson vs. New York Central Railroad Company, there may be filed [fol. 462] by said company but one joint bill of exceptions in both causes, which said bill of exceptions shall be considered as the Bill of Exceptions in each of said causes.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Edward H. Johnson. Marley & Reed, Attorneys for New York Central Railroad Company.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS AND BILL OF EXCEPTIONS IN CAUSE NO. 6300—FILED JULY 21, 1927

It is hereby stipulated and agreed by and between Myrtle J. Johnson, the above named plaintiff and the New York Central Railroad Company, a corporation, the above named defendant, by and through their respective attorneys, that photographic prints of plaintiff's exhibits 5, 6, 7, 8, 9 and 10 may be inserted in the Bill of Exceptions and that the original x ray films will be filed with the clerk of the court and by him transmitted with his record to the United States Circuit Court of Appeals for the Eighth Circuit, for the

inspection thereof by the said Circuit Court of Appeals and it is further agreed by respective parties that as this cause was by the court consolidated for trial with and was tried with cause No. 6299 entitled Edward H. Johnson vs. New York Central Railroad Company, there may be filed by said company but one joint bill of exceptions in both causes in which said Bill of Exceptions shall be considered as the bill of exceptions in each of said causes.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Myrtle J. Johnson. Marley & Reed, Attorneys for New York Central Railroad Company.

[File endorsement omitted.]

In United States District Court

Agreement Between Counsel as to Record on Writs of Error—Filed July 27, 1927

This Agreement, Made and entered into by and between Edward H. Johnson, the above named Plaintiff, and The [fol. 463] New York Central Railroad Company, a corporation, the above named defendant, by and through their respective attorneys, Witnesseth:

That Whereas, the above entitled cause was, over the objections and exceptions of the said defendant, consolidated for trial with the case entitled Myrtle J. Johnson, plaintiff, vs. The New York Central Railroad Company, a corporation, defendant, and numbered 6300; and,

Whereas, by agreement between the parties but one Bill of Exceptions was filed to be used and shall be used in both of said causes as the Bill of Exceptions in each one; and,

Whereas, the said New York Central Railroad Company, a corporation, has filed separate petitions for writs of error and separate assignments of error and given separate supersedeas bonds and served separate citations, and there were separate verdicts returned in said causes and separate judgments entered thereon.

It Is Therefore Agreed by and between the aforesaid parties, by and through their respective attorneys, that in obedience to the above writs of error a single transcript con-

solidating therein the records in both of the aforesaid causes shall be prepared by the Clerk of the aforesaid District Court, to be filed as a complete transcript of record in both of the said causes in response to both of the said writs of error and citations and assignments of error; and that both of said causes may be consolidated for hearing in the United States Circuit Court of Appeals, in and for the Eighth Judicial Circuit, and that the Clerk of said United States Circuit Court of Appeals shall print but one record to be used in both of said causes, said record to contain such record entries, pleadings and filings as may be designated by either the above named plaintiffs or the above named defendant in the manner provided by the rules of the aforesaid Circuit Court of Appeals.

Atwood, Wickersham, Hill & Chilcott, Attorneys for Edward H. Johnson. Marley & Reed, Attorneys for the New York Central Railroad Company, a Corporation.

[File endorsement omitted.]

[fol. 464] In United States District Court

Præcipe for Transcript of Record—Filed July 27, 1927

To the Clerk of the above named court:

Pursuant to stipulation whereby it is agreed by the counsel of the respective parties in the foregoing causes that there shall be but one transcript of record in the above causes, you are hereby requested in making up such transcript to set out in the case of Edward H. Johnson vs. The New York Central Railroad Company the following, to wit:

I. The filing of the petition for writ of error, and the writ of error.

II. The filing of the assignments of error, and the assignments of error.

III. The citation, together with service thereof, and the filing thereof.

IV. The filing of the supersedeas bond, including its approval, and the bond.

V. The filing of plaintiff's petition, and the petition.

VI. The filing of defendant's answer, and the answer.

VII. Motion of defendant to dissolve the attachment, and the filing of said motion.

VIII. The order dissolving the attachment.

IX. Order of the court consolidating for trial the case of Edward H. Johnson, Plaintiff, vs. The New York Central Railroad Company, a corporation, Defendant, Numbered 6299, with the case of Myrtle J. Johnson, Plaintiff, vs. The New York Central Railroad Company, a corporation, Defendant, Numbered 6300.

X. The adjournments of court from day to day.

XI. The verdict of the jury.

XII. The judgment of the court.

XIII. All orders allowing time and extending time for filing of the Bill of Exceptions.

XIV. All orders extending time for filing the transcript of record in the United States Circuit Court of Appeals in and for the Eighth Circuit.

XV. All stipulations between the plaintiffs in both of the above causes and the defendant in the order of their filing. [fol. 465] And you are hereby requested in making up such transcript to set out in the case of Myrtle J. Johnson vs. The New York Central Railroad Company the following, to-wit:

I. The filing of the petition for writ of error, and the writ of error.

II. The filing of the assignments of error, and the assignments of error.

III. The citation, together with service thereof, and the filing thereof.

IV. The filing of the supersedeas bond, including its approval, and the bond.

V. The filing of plaintiff's petition, and the petition.

VI. The filing of the defendant's answer, and the answer.

VII. Motion of the defendant to dissolve the attachment, and the filing of said motion.

VIII. The order dissolving the attachment.

IX. Order of the court consolidating for trial the case of Myrtle J. Johnson, Plaintiff, vs. The New York Central Railroad Company, a corporation, Defendant, Numbered 6300, with the case of Edward J. Johnson, Plaintiff, vs.

The New York Central Railroad Company, a corporation, Defendant, Numbered 6299.

X. The adjournments of court from day to day.

XI. The verdict of the jury.

XII. The judgment of the court.

XIII. All orders allowing time and extending time for the filing of the Bill of Exceptions.

XIV. All orders extending time for filing the transcript of record in the United States Circuit Court of Appeals in and for the Eighth Circuit.

XV. The joint Bill of Exceptions filed as a Bill of Exceptions in both cases, and showing the filing of the same.

Marley & Reed, Attorneys for the New York Central Railroad Company, a Corp.

[File endorsement omitted.]

[fol. 466] Clerk's certificate to foregoing transcript omitted in printing.

In United States Circuit Court of Appeals,
Eighth Judicial Circuit

No. 8020

New York Central Railroad Company, a Corporation, Plaintiff in Error,

vs.

Edward H. Johnson, Defendant in Error

Motion for Leave to File Transcript and to Consolidate Two Causes for Hearing—Filed Nov. 2, 1927

Now comes New York Central Railroad Company, as Plaintiff in Error and advises and informs the Honorable Court that heretofore to-wit: on the 23rd day of February, 1927, at the trial of a cause then and there pending in the District Court of the United States for the Western Division of the Western District of Missouri before the Honorable Merrill E. Otis, District Judge, wherein Edward H.

Johnson was plaintiff and the New York Central Railroad Company, was defendant, a judgment for Ten Thousand ($10,000.00) Dollars was then and there rendered in favor [fol. 467] of the said Edward H. Johnson and against the said New York Central Railroad Company; that thereafter, to-wit, on the 11th day of April, 1927, the New York Central Railroad Company filed in the said District Court, a petition for Writ of Error and an Assignment of Errors; that then and there and on the same day, to-wit: April 11th, 1927, it obtained an order from the said Honorable Merrill E. Otis, allowing the said Writ of Error; that on the same day, to-wit: April 11th, 1927, the said New York Central Railroad Company, filed in said Court after it was approved by the said Honorable Merritt E. Otis, District Judge, a supersedeas bond in the sum of Twenty Thousand ($20,000.00) Dollars; that on the same day, to-wit: April 11th, 1927, the said Trial Judge made an order allowing the usual form and the same was on the said day, served upon the attorneys for the said Edward H. Johnson and on the same day it was filed with the Clerk of the said District Court; that on the same day, to-wit: April 11th, the said Writ of Error was issued out of the office of the clerk of the said District Court; that on the same day, to-wit: April 11th, 1927, the said Trial Judge made an order allowing the said New York Central Railroad Company, as Plaintiff in Error, sixty (60) days after the adjournment of the term of the said District Court in which to file a Bill of Exceptions; that the said term adjourned April 23*rd*, 1927, and that thereafter, to wit: On May 26th, 1927, the said Judge made a further order extending the time in which to file a Bill of Exceptions in said cause to on or before July 25th, 1927, and on the same day, to wit: May 26th, 1927, said Judge made an order extending the time in which to file the Transcript of the said cause in this Court to August 1st, 1927.

That thereafter, to wit: July 5th, 1927, the said trial Judge made a further order extending the time in which to file Bill of Exceptions in said cause to August 25th, 1927; that thereafter, to-wit: on July 18th, 1927, the said Judge made a further order extending the time in which to file Transcript of said cause in this court to September 1st, 1927; that thereafter, to wit: on July 21st, 1927, the Bill of Exceptions in said cause was by the said New York Central

Railroad Company presented to the said Court and was by the said Judge approved, signed, sealed, allowed and ordered to be filed as a part of the record in the said cause and the same so signed and sealed was, on the said July 21st, 1927, filed with the clerk of the said District Court and became a part of the record of said cause; that thereafter, to-wit: on July 27th, 1927, there was filed in the said cause, [fol. 468] a stipulation signed by the attorneys for the respective parties, stipulating that because of the consolidation for trial of the said cause with the case of Myrtle J. Johnson vs. New York Central Railroad Company so that the same were tried as one case, a single transcript embodying the same Bill of Exceptions showing the separate rulings and separate exceptions assigned separately in each case, should be filed in this court as and for the transcript of both of said causes, by and with the consent of this Court.

That the Clerk of the aforesaid District Court was unable to complete the said transcript until the 31st day of October, 1927.

By reason of the Premises, the said New York Central Railroad Company, a corporation, as Plaintiff in Error, prays for an order in this Court allowing it to file the said single transcript as a compliance with the Writ of Error issued herein as aforesaid; and that this cause may, after being docketed as a separate cause in this court, be consolidated by the Clerk of this Court for hearing, with said cause of Myrtle J. Johnson vs. New York Central Railroad Company, on the same record and that the hearing of the said two causes may be had by this court on said single transcript as though the same were but one cause.

All of which is respectfully submitted.

Albert S. Marley, W. Haley Reed, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH JUDICIAL CIRCUIT

No. 8021

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,
Plaintiff in Error,

vs.

MYRTLE J. JOHNSON, Defendant in Error

MOTION FOR LEAVE TO FILE TRANSCRIPT AND TO CONSOLIDATE TWO CAUSES FOR HEARING—Filed Nov. 2, 1927

Now comes New York Central Railroad Company, as Plaintiff in Error and advises and informs the Honorable Court that heretofore, to-wit: on the 23rd day of February, [fol. 469] 1927, at the trial of a cause then and there pending in the District Court of the United States for the Western Division of the Western District of Missouri, before the Honorable Merrill E. Otis, District Judge, wherein Myrtle J. Johnson was plaintiff and the New York Central Railroad Company, was defendant, a judgment for Twenty-five Thousand (25,000.00) Dollars was then and there rendered in favor of the said Myrtle J. Johnson and against the said New York Central Railroad Company; that thereafter, to-wit: on the 11th day of April, 1927, the New York Central Railroad Company filed in the said District Court, a petition for Writ of Error and an Assignment of Errors that then and there and on the same day, to-wit: April 11th, 1927, it obtained an order from the said Honorable Merrill E. Otis, allowing the said Writ of Error; that on the same day, to-wit: April 11th, 1927, the said New York Central Railroad Company filed in said Court after it was approved by the said Merrill E. Otis, District Judge, a supersedeas bond in the sum of Fifty Thousand ($50,000.00) Dollars; that on the same day, to-wit: April 11th, 1927, the said District Judge signed a Citation of the usual form and the same was on the said day, served upon the attorneys for the said Myrtle J. Johnson and on the same day it was filed with the clerk of the said District Court; that on the same day, to-wit: April 11th, 1927, the said Writ of Error was issued out of the office of the Clerk

of the said District Court; that on the same day, to-wit: April 11th, 1927, the said Trial Judge made an order allowing the said New York Central Railroad Company, as Plaintiff in Error, sixty (60) days after the adjournment of the term of the said District Court, in which to file a Bill of Exceptions; that the said term adjourned April 23rd, 1927; and that thereafter, to-wit: on May 26th, 1927, the said Judge made a further order extending the time in which to file a Bill of Exceptions in said cause to on or before July 25th, 1927, and on the same day, to-wit: May 26th, 1927, said Judge made an order extending the time in which to file the Transcript of the said cause in this court to August 1st, 1927; that thereafter, to-wit: July 5th, 1927, the said Trial Judge made a further order extending the time in which to file Bill of Exceptions in said cause to August 25th, 1927; that thereafter, to-wit: on July 18th, 1927, the said Judge made a further order extending the time in which to file Transcript of said cause in this Court to September 1st, 1927; that thereafter, to-wit: on July 21st, 1927, the Bill of Exceptions in said cause was by the said New York Central Railroad Company presented to the Court [fol. 470] and was by the said Judge approved, signed, sealed, allowed and ordered to be filed as a part of the record in said cause and the same so signed and sealed was, on the said July 21st, 1927, filed with the clerk of the said District Court and became a part of the record of said cause; that thereafter, to-wit: on July 27th, 1927, there was filed in the said cause a stipulation signed by the attorneys for the respective parties stipulating that because of the consolidation for trial of the said cause with the case of Edward H. Johnson vs. New York Central Railroad Company so that the same were tried as one case, a single transcript embodying the same Bill of Exceptions showing the separate rulings and separate exceptions assigned separately in each case, should be filed in this court as and for the transcript of both of said causes, by and with the consent of this court.

That the Clerk of the aforesaid District Court was unable to complete the said transcript until the 31st day of October, 1927.

By reason of the Premises, the said New York Central Railroad Company, a corporation, as Plaintiff in Error,

prays for an order in this Court allowing it to file the said single transcript as a compliance with the Writ of Error issued herein as aforesaid; and that this cause may, after being docketed as a separate cause in this court, be consolidated by the Clerk of this Court for hearing with cause of Edward H. Johnson vs. New York Central Railroad Company on the same record, and that the hearing of the said two causes may be had on said single transcript by this court as though the same were but one cause.

All of which is respectfully submitted,

Albert S. Marley, W. Haley Reed, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 471] In United States Circuit Court of Appeals

[Title omitted.]

Order Consolidating Causes for Hearing on One Transcript of the Record—Nov. 14, 1927

In these causes counsel for the plaintiff in error has filed motions for orders allowing the filing in this Court of a single transcript of the record as a compliance with separate writs of error sued out and for the consolidation of these causes for hearing on a single transcript of the record.

The transcript of the record from the District Court in these causes having been filed and the causes docketed in this Court as Nos. 8020 and 8021, respectively, on the 2nd day of November, A. D. 1927, the filing and docketing thereof is hereby confirmed, and it appearing that the transcript of the record contains, pursuant to stipulation of counsel, one bill of exceptions showing the separate rulings and separate exceptions assigned separately in each cause, it is further ordered by this Court that these causes be, and they are hereby, consolidated for the purpose of hearing in this Court on said single transcript of the record from said District Court.

November 14, 1927.

[fols. 472 & 473] Appearances of counsel omitted in printing.

[fol. 474] Minute entry of argument and submission May 10, 1928, omitted in printing.

[fol. 475] In United States Circuit Court of Appeals, Eighth Circuit

May Term, A. D. 1928

No. 8020

New York Central Railroad Company, a Corporation, Plaintiff in Error,

vs.

Edward H. Johnson, Defendant in Error

In Error to the District Court of the United States for the Western District of Missouri

May Term, A. D. 1928

No. 8021

New York Central Railroad Company, a Corporation, Plaintiff in Error,

vs.

Myrtle J. Johnson, Defendant in Error

In Error to the District Court of the United States for the Western District of Missouri

Mr. A. S. Marley (Mr. W. Haley Reed, Mr. Sidney C. Murray and Mr. M. A. Jersild, were with him on the brief) for plaintiff in error.

Mr. Price Wickersham (Mr. John H. Atwood, Mr. Oscar S. Hill and Mr. C. C. Chilcott, were with him on the brief) for defendants in error.

Before Kenyon, Circuit Judge, and Symes and Martineau, District Judges

OPINION—Filed July 2, 1928

[fol. 476] SYMES, District Judge, delivered the opinion of the Court.

These two cases are here by separate writs of error sued out by the railroad company, from separate judgments entered in the District Court of the United States for the Western District of Missouri, in favor of the respective plaintiffs below, defendants in error here. The two actions were consolidated, tried as one, and the errors complained of are the same in both.

No. 8020 was brought by Edward H. Johnson to recover damages, as the husband of Myrtle J. Johnson, for injuries alleged to have been sustained by her, while riding on one of defendant's trains as a passenger, by reason of alleged negligence of the railroad company.

In No. 8021, Myrtle J. Johnson, plaintiff below, seeks to recover damages alleged to have been suffered by her, by reason of the same alleged negligence of the railroad company.

Myrtle J. Johnson, in company with her sister-in-law, Imogene Johnson, was riding on a so-called "extra fare, solid Pullman train" of the defendant company, en route from Harmon, New York, to Chicago, Illinois. The ladies spent the evening in the club car, and between 11 and 12 P. M. repaired to their berth, lower 8, car 64, located on the right hand side of the train as it traveled west. Imogene Johnson seated herself on the edge of the berth with a suitcase open before her, taking out their night clothes, when, according to the evidence of the two ladies, the speed of the train was suddenly checked, and then accelerated. At the same time Myrtle J. Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtains in order to steady herself, facing and talking to Imogene. The two women describe what happened as a terrible jerk, as though the train was going to stop, but did not; then a yank, and that the train lurched as it went on again. Imogene Johnson fell across the berth and towards the foot, while Myrtle was thrown three or four

feet into the aisle of the sleeper towards the opposite berth. Myrtle testified:

"I was standing there holding on to the curtain with my right hand; had it just below the upper berth, just holding it below the upper berth and securing it on the board that separates the two berths and my left hand on my hip. The train gave an awful jerk and jolt and a terrible lurch. And I had my hand hold of the curtain just below the lower part [fol. 477] of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on my hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw my head up against the edges of the upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor."

Imogene said:

"This was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced. The sudden lurch, * * * swung her (Myrtle) around. She was trying to hang on to the curtain." Imogene scrambled to her feet, and according to her testimony, heard Myrtle moaning, and found her

"rocking back and forth in the aisle, saying 'Oh my head, Oh my head,'" etc.

She assisted Myrtle up and into the berth, rubbed her head, talked to her, helped her to undress and get to bed. There were no other eye-witnesses to these happenings.

The two ladies occupied the same berth and slept till nearly noon the next morning. Imogene says that upon awakening she found Myrtle paralyzed on her entire right side. Her face was drawn as if something had pulled it to one side, and she was uttering inarticulate sobs, crying, etc.

A doctor was not obtainable until the arrival of the train at Chicago. Myrtle Johnson was carried out of the Pullman, put in a wheel chair, taken to another station, and with her companion boarded the Santa Fe train to Kansas City. Upon her arrival there she was taken to Grace Hospital.

According to Imogene Johnson, "Up to this time Myrtle was unable to talk, one-half of her tongue being paralyzed."

The case was diagnosed as odema of the brain, resulting from injury, causing a partial paralysis of the right side.

The members of the train crew, i. e., the conductor, porter, maid and brakeman, testifying for the railroad company, said they did not recall any unusual jar or sudden jerk at the time in question. It is sufficient to say that there was a square conflict of evidence as to the actual happenings. The evidence of these employees, who were [fol. 478] not eye-witnesses, was necessarily of a negative character, nor was the matter called to their attention until sometime later. Separate verdicts were rendered in favor of Myrtle Johnson and Edward Johnson.

Thirty alleged errors in the conduct of the trial are set out in the specifications. Those requiring attention may be classified under three heads. 1. Refusal of the court to direct a peremptory verdict in favor of the defendant at the close of the plaintiff's case, and at the close of all the evidence. 2. The admission of incompetent evidence offered by the plaintiff. 3. Improper argument to the jury by counsel for the plaintiff. The specifications of error are practically identical in both cases.

1. The sole question here is: Had the plaintiff established a prima facie case, and if so, was this situation changed at the conclusion of all the evidence?

The plaintiff and her sister-in-law gave a most graphic description of the accident. That the plaintiff was thrown, and suffered injuries of a more or less grievous and permanent nature, is not disputed. So we inquire: Did the accident result from some unusual or extraordinary happening; such as a sudden stopping, starting or jerking of the train; beyond what might ordinarily be expected by passenger under all the surrounding circumstances, which include the usual and necessary starting, stopping, high rate of speed, inevitable rocking, swaying, etc., of the modern passenger train?

The plaintiff and her co-witness qualified by stating they had had wide experience in traveling on railroad trains of a similar nature and kind. We see no reason why they were not competent to state in their own way just what occurred,

and the results thereof. That a passenger on public conveyances is qualified to state his experiences, observations, and the phenomena ordinarily incident to a railroad journey, such as testified to by these two ladies, has long been settled. The usual movements of a train, referred to above, do not constitute negligence, and the risks thereof are assumed by the passenger. The plaintiff's evidence is that this particular accident resulted from a slackening and jerk, or swaying of a most extraordinary and unusual character.

Counsel discuss the doctrine of res ipsa loquitur, "the thing itself speaks." The Federal courts have decided that it applies to cases of this character. That is, the train being under the sole control of the carrier and a passenger is [fol. 479] injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating the train that the law imposes upon it. It therefore follows in the instant case that the plaintiff having made a prima facie case, a legal presumption arises under the doctrine above mentioned in favor of the plaintiff, which it became incumbent upon the defendant to explain or meet, but not necessarily by a preponderance of the evidence, because the burden of proving negligence is at all times upon the plaintiff. San Juan Light & Transit Co. v. Requena, 224 U. S. 89; Sweeney v. Erving, 228 U. S. 233; William B. Stokes v. Francis Saltonstall, 13 Pet. 181; Cincinnati, N. O. & T. P. Ry. Co. v. South Fork Coal Co., 139 Fed. 528; Railroad Company v. Pollard, 22 Wall. 341; Transportation Company v. Downer, 11 Wall. 129; Cleveland, Cincinnati, Chicago & St. Louis Ry. Company v. Hadley, 16 L. R. A. (N. S.) 527, 82 N. E. 1025. This it attempted to do, and thus made an issue of fact for the jury under proper instructions. The court told the jury that the railroad company was not an insurer of the safety of its passengers; that the latter are not entitled to recover damages merely by showing they were injured; that the carrier was only liable for negligence in exercising that high degree of care that the law imposes upon it; and that there could be no recovery unless the jury found by a preponderance of the

testimony that the injury was caused by an extraordinary and unusual lurching, etc., of the train, and not then, unless the same was caused by the defendant's negligence, and that the burden was upon the plaintiff to prove his case. The correctness of all this was not, for reasons we have stated, affected by the further instruction that if the injury was directly caused by an extraordinary lurching and jerking, the plaintiff need not go further and prove what negligence, if any, caused that lurching, the law presuming that an extraordinary occurrence of this kind was due to the fault of the carrier; but that this presumption was rebuttable, and not conclusive. Mendelson v. Davis, 281 Fed. 18; Lee Line Steamers v. Robinson, 218 Fed. 559.

The railroad company did not charge contributory negligence.

2. The several specifications under this heading are based upon objections made to hypothetical questions submitted to medical experts. These witnesses qualified professionally, and it was therefore proper to ask them what [fol. 480] their judgment would be upon all or any part of the facts that have some support in the record, provided a sufficient number of facts are assumed to enable the witness to give an intelligent opinion. The form of questions of this character rests largely in the sound discretion of the trial court, and may be so framed as to reflect the theory of the party propounding them. A question otherwise proper is not rendered improper for the reason that certain additional facts might have been put in which would assist such witness in giving a more satisfactory answer. The jury, no doubt, understood that these questions were hypothetical; that is, based on assumed facts, so there was no invasion of the peculiar province of the jury to decide the ultimate issues. A qualified physician or surgeon may state the results of specific occurrences on the body, Wheeler v. Chicago & W. I. R. Co., et al., 108 N. E. 330, and the extent and character of the disability resulting therefrom, and whether certain conduct is consistent with having sustained particular injuries. Scott v. The Homesteaders, 129 N. W. 310.

Likewise, it has been held that an osteopath is competent to express an opinion on the injury or disease, and the

treatment thereof. Barnes v. Danville Street Ry., 235 Ill. 566; 22 C. J. 677; 22 C. J. 543; Macon Ry. & Light Co. v. Mason, 51 S. E. 569.

3. Both counsel for the plaintiff who addressed the jury stated that the defense charged that:

"The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis."

And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We therefore deem it proper to observe that this line of argument was likely to create [fol. 481] prejudice, and did not aid the court or jury in the performance of their duties.

The record containing no reversible errors, the judgment in each of the two cases is affirmed.

[fol. 482] In United States Circuit Court of Appeals

[Title omitted]

Judgment in Cause No. 8020—July 2, 1928

In Error to the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Edward H. Johnson have and recover against the New York Central Railroad Company, a corporation, the sum of Twenty Dollars for his costs herein and have execution therefor.

[fol. 483] In United States Circuit Court of Appeals

[Title omitted]

Judgment in Cause No. 8021—July 2, 1928

In Error to the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Myrtle J. Johnson have and recover against the New York Central Railroad Company, a corporation, the sum of Twenty Dollars for her costs herein and have execution therefor.

[fol. 484] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 485] Supreme Court of the United States, October Term, 1928

No. 455

Order Allowing Certiorari—Filed October 15, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. But the argument is to be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial.

[fol. 486] Supreme Court of the United States, October Term, 1928

No. 456

Order Allowing Certiorari—Filed October 15, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. But the argument is to be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial.

Endorsed on cover: File No. 33,764, 33,765. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 455. New York Central Railroad Company, petitioner, v. Edward H. Johnson. Term No. 456. New York Central Railroad Company, petitioner, vs. Myrtle J. Johnson. Petition for writs of certiorari and exhibit thereto. Filed September 20th, 1928. File No. 33,764, 33,765.

SEP 20 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
EDWARD H. JOHNSON,
Respondent.
No. 455

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
MYRTLE J. JOHNSON,
Respondent.
No. 456

PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

BADGLEY & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Petition for writs of certiorari	1-8
Statement of the case	2
Proceedings in lower courts	4
Grounds for certiorari	6
Motion for writs of certiorari	7
Verification and certificate of counsel	8
Brief in support of petition of writs of certiorari	9-24
Reference to report of opinion of lower court	9
Grounds on which jurisdiction of the court is invoked	9
1. Date of judgments to be reviewed	9
2. Specific claims advanced and rulings made in lower courts which are relied upon as a basis of this court's jurisdiction	9
3. Statutory provision under which this court's jurisdiction is invoked	10
4. Case believed to sustain this court's jurisdiction	10
Statement of the case	10
Specification of assigned errors intended to be argued	10
Argument	11-24

SUMMARY OF ARGUMENT.

I.

The doctrine, *res ipsa loquitur* was improperly applied in these cases	11-20
(A) The mere happening of an injurious accident to a passenger without his fault does not raise the presumption of a carrier's negligence. The circumstances of the occurrence must be such as to give ground for a reasonable inference that the injury would not have occurred if due care had been employed before there is any presumption of negligence	11

PAGE

(B) The United States Courts have not extended the rule of *res ipsa loquitur* to cases where an injury is shown to have resulted from lurching, jerking or swaying of cars and neither the cases cited by the Circuit Court of Appeals nor the circumstances of this occurrence authorize its application here 13

(C) The decision of the Circuit Court of Appeals conflicts with applicable decisions of other Circuit Courts of Appeals 18

II.

The prejudicial argument to the jury deprived the defendant of its right to a fair and impartial trial and the orders affirming the judgments of the lower court so far sanctioned such a departure from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision 20

CASES CITED.

Bollinger v. Railway Co., 98 N. Y. S. 641 17

Chicago M. & St. P. Ry. Co. v. Irving, 234 Fed. 562 16

C. N. O. & T. P. Ry. Co. v. South Fork Coal Co, 139 Fed. 528 ..... 11, 14, 15

C. C. C. & St. L. Ry. Co. v. Hadley, 82 N. E. 1025 15

Delaney v. Buffalo R. & P. Ry. Co., 266 Pa. 122, 109 Atl. 605 18

Foley v. B. & M. R. Co., 193 Mass. 332, 79 N. E. 765 17

Graves v. U. S., 150 U. S. 118, 120 22

Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 16

Gulf M. & N. R. Co. v. Wells, 72 L. Ed. 152 17

Hall v. U. S., 150 U. S. 76 22

Hilliard v. Chicago R. Co., 163 Ill. App. 282, 289 21

Lee Line Steamers v. Robinson, 218 Fed. 559 15

PAGE

Mathew v. Wabash R. Co., 78 S. W. 271, 115 Mo. App. 468, 199, U. S. 605 21

Mendelson v. Davis, 281 Fed. 18 15

Norfolk & W. Ry. Co. v. Birchett, 252 Fed. 512 ..... 5, 18

Northern Ry. Co. v. Page, 274 U. S. 65 ..... 10, 17

Ozanne v. Illinois Cen. R. Co., 151 Fed. 900, Affd. 157 Fed. 1004 ..... 5, 19

Railroad Company v. Pollard, 22 Wall. 341 ..... 15, 19

San Juan Light Co. v. Requena, 224 U. S. 89, 98 ..... 6, 12, 15

Stokes v. Saltonstall, 13 Pet. 181 ..... 15, 19

Sweeney v. Erving, 228 U. S. 233 ..... 6, 12, 15

The Little Silver, 189 Fed. 980, 986 21

Transportation Company v. Downer, 11 Wall. 129 ..... 11, 14, 15

U. S. v. Rose, 92 U. S. 281, 283 16

Union Pac. R. Co. v. Field, 137 Fed. 14 22

Waldron v. Waldron, 156 U. S. 361, 367, 383, 384 22

Walsh v. Boston El. Ry., 256 Mass. 17, 152 N. E. 64 18

Weinschenk v. Railroad Co., 190 Mass. 250, 76 N. E. 662 17

Wilson v. U. S., 149 U. S. 60, 68 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
EDWARD H. JOHNSON,
Respondent.
No. .....

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
MYRTLE J. JOHNSON,
Respondent.
No. .....

PETITION FOR WRITS OF CERTIORARI TO BE ADDRESSED TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of matter involved.

Your petitioner, New York Central Railroad Company, respectfully represents that the Circuit Court of Appeals for the Eighth Circuit has affirmed judgments entered by the District Court of the United States for the Western District of Missouri, Western Division, in favor of the respondents, Myrtle J. Johnson and Edward H. Johnson, her husband, re-

spectively, for damages for injuries alleged to have been sustained by the respondent, Myrtle J. Johnson, on September 27, 1925, while a passenger on one of petitioner's trains. The cases were tried together in the District Court and were considered on one record in the Circuit Court of Appeals. (The opinion, not yet reported, appears in the Appendix at page 25, *post*.)

Confident that it can demonstrate to this Honorable Court that the record shows no grounds upon which a recovery in these cases can be sustained and that it did not secure a fair and impartial trial, your petitioner submits that writs of certiorari should be granted, because the Circuit Court of Appeals by its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals and has based its decision on an erroneous statement of law, conflicting with decisions of this Court, and because it has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Statement of the case.

The declarations in each case charged that while Myrtle J. Johnson was a passenger for hire and when the train was between Utica and Syracuse the petitioner negligently caused and permitted the car in which she was riding to "suddenly violently and unusually surge, lurch, jerk, jolt, sway, tilt and rock" as a result of which negligence she was caused to fall and thereby injured. (R. 6-10.) There was no direct evidence of negligence. The cases were submitted to the jury and the judgments affirmed by the Circuit Court of Appeals on the theory that the doctrine of *res ipsa loquitur* applied.

Between 11:00 and 12:00 o'clock in the evening, after all but the night lights had been extinguished, (R. 107), Myrtle

J. Johnson and her sister-in-law, Imogene Johnson, who were passengers on one of petitioner's fast trains enroute from Harmon, New York, to Chicago, left the club car of the train and went to their berth to retire for the night (R. 107). While Imogene Johnson was seated on the side of the berth, reaching for her night clothes, which were in a suitcase at the foot of the berth (R. 275), and while Myrtle Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtain (R. 108, 274), there came what the former described as "the most terrible jerk, almost as though the train were going to stop, but didn't, and jerked and swayed and went on" (R. 108), and what the latter described as "an awful jerk and jolt and a terrific lurch" (R. 275). These movements, Myrtle Johnson testified, threw her body around and her head against the edge of the upper berth (R. 276). Imogene Johnson found her in the aisle complaining about her head (R. 109). She assisted her to bed, where both ladies slept until nearly noon the next day (R. 146). Imogene Johnson, upon awakening, found that her sister-in-law was ill (R. 114). While a total of twenty-one witnesses testified for the respondents in regard to the physical condition of Myrtle Johnson, there were no witnesses to the actual occurrence except these two ladies. Six members of the train crew, however, testified that there was no unusual jerk or jar. (R. 393, 383, 386, 395, 398-399, 408.) The train was running at its usual rate of speed (R. 393).

In their address to the jury both counsel for respondents stated that the defense was that Myrtle Johnson had the syphilis and such statements as these were made:

> "The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the

> society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 421, 422.)
>
> "Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 435.)

and as the Circuit Court of Appeals states, proceeded to dilate on and exploit this text *with no justification for the assumption* or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the petitioner. (*Post* 31.)

Objections were duly made to the introduction of any evidence under the pleadings (R. 93) and to testimony relating to the character of the jerks and jolts of the car (R. 111, 315, 316); motions to direct verdicts for the defendant were made at the conclusion of plaintiff's case (R. 375, 376) and again at the conclusion of all of the evidence (R. 24, 419). Objections were also made to the above mentioned argument to the jury and to the instructions to the jury applying the doctrine of *res ipsa loquitur* to these cases. (R. 451-458.)

The jury brought in verdicts for the plaintiffs for the full amount sued for in each case—$25,000 in Myrtle Johnson's case and $10,000 in her husband's case—upon which verdicts judgments were entered (R. 25). On writs of error, review was had by the Circuit Court of Appeals, Eighth Circuit, and that Court, on July 2, 1928, affirmed both judgments. (R. 480.)

There is involved in these cases, an important question of general law, viz., does the doctrine of *res ipsa loquitur* apply to a case where a passenger charges that he has sustained injuries due to the lurching or swaying of a train and the proof shows that such movements occurred not when the train was starting or stopping, but while it was proceeding at its usual speed between two stations and when no evi-

dence of an accident to the car or train is produced. In other words may a presumption of negligence be based upon opinion evidence as to the character of such movements when all evidence of physical facts is consistent with the exercise of due care by the carrier. Heretofore, when Federal Courts have had occasion to consider this question, the answer has been in the negative. *Norfolk & W. Ry. Co.* v. *Birchett*, Fourth Circuit, 252 Fed. 512; *Ozanne* v. *Illinois Central R. Co.*, 151 Fed. 900, affirmed by Sixth Circuit in 157 Fed. 1004.

Petitioner is advised that a careful investigation of cases decided by this Court and the Circuit Court of Appeals, reveals no instance in which *res ipsa loquitur* has been extended to a case like the instant cases. "The only presumptions of fact which the law recognizes are immediate inferences from *facts* proved" and it is only where these facts show the circumstances attendant upon an "accident" to be of such a character as to justify a jury in inferring negligence as the cause of an injury that such an inference may be made. The Circuit Court of Appeals held that negligence may be presumed from the fact of injury alone. Even if the circumstances in these cases are considered, the effect of the decision is that negligence may be presumed from a result which common experience shows may be and generally is due to no negligence whatever. To reach its decision, the Circuit Court of Appeals, ignoring this Court's definition of the doctrine *res ipsa loquitur*, defined this doctrine as follows:

> "that is; the train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating the train that the law imposes upon it," (*Post* 28)

stated that the doctrine applied in these cases and thereupon held that the plaintiffs had made a case entitling them to go to the jury.

Another important question in these cases is whether verdicts are to be sustained when secured by argument to the jury which the Circuit Court of Appeals "deemed it proper to observe was likely to create prejudice." (*Post* 31.)

Reasons relied upon for granting writs of certiorari.

Wherefore, and for additional reasons hereafter set forth in counsel's brief, your petitioner says review upon the granting of writs of certiorari is proper, for that:

1. The Circuit Court of Appeals has decided an important question of general law, in a way conflicting with decisions of the Supreme Court of the United States in that the Circuit Court of Appeals defines the doctrine of *res ipsa loquitur* as follows:

> "The train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating its train that the law imposes upon it." (*Post* 28.)

whereas the United States Supreme Court has made one of these conclusions a condition to the application of the rule and has thus stated the doctrine:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur, if the one having control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (*San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98; *Sweeney* v. *Erving*, 228 U. S. 233.)

2. The Circuit Court of Appeals by its decision thus conflicting with the decisions of this Honorable Court has erroneously applied the doctrine of *res ipsa loquitur* to the

facts in these cases without which there are no grounds for recovery.

3. The Circuit Court of Appeals in its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals, in that by its decision it has held that evidence of a physical injury to a passenger in a car under the control of a carrier, together with statements that such injury was caused by the unusual jerking and lurching of the car in which the passenger was riding is sufficient to make a *prima facie* case, whereas the Circuit Court of Appeals for the Fourth and Sixth Circuits have held that proof of such injury, together with similar statements does not bring a case within the doctrine of *res ipsa loquitur* and in the absence of evidence of the carrier's negligence does not entitle a passenger to damages.

4. The Circuit Court of Appeals by its decision holding that the improper argument to the jury by both counsel for respondents was likely to create prejudice and its inconsistent order affirming the judgments of the lower courts has so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Your petitioner, therefore, respectfully prays that writs of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals had in these cases, entitled *New York Central Railroad Company* v. *Edward H. Johnson* and *New York Central Railroad Company* v. *Myrtle J. Johnson*, numbers 8020 and 8021 respectively on the dockets of said Court, to the end that these causes may be reviewed and determined by this Honorable Court; and that said judgments and the orders of said Circuit Court of Appeals be reversed, and it also prays for such

other, further or different remedies and relief in the premises as to this Court may seem appropriate and in conformity with law; and your petitioner will ever pray, etc.

NEW YORK CENTRAL RAILROAD COMPANY,

By .....

General Attorney.

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel.

Sidney C. Murray, being duly sworn, makes oath that he is general attorney and counsel for the petitioner in the above entitled cause and that he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

.....

Subscribed and sworn to before me this ..... day of September, A. D. 1928.

.....

Notary Public.

The undersigned, duly admitted to practice in the Supreme Court of the United States, certifies that he has examined the foregoing petition for writs of certiorari; that the petition is not made for delay, but, in the opinion of the undersigned is wholly meritorious and ought to be granted.

Chicago, Illinois, September ....., 1928.

.....

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals in these cases is not yet reported. It will be found in the record at page 474 and appears in the appendix hereto, *post* 25.

Grounds on which jurisdiction of this Court is invoked.

The opinion of the Circuit Court of Appeals was filed July 2, 1928, and on that day orders were entered affirming the judgments of the District Court. (R. 480.)

In the Circuit Court of Appeals as well as in the District Court, the petitioner contended that these cases were not proper ones for the application of the doctrine, *res ipsa loquitur*. It was contended that verdicts should have been directed for the petitioner (R. 44, 68, 375, 419); that those portions of the trial Judge's charge to the jury which were predicated on the doctrine of *res ipsa loquitur* were erroneous (R. 47, 49, 50, 70, 72, 73, 74, 442, 450-456); and that evidence in regard to lurching and swaying should have been excluded. (R. 41, 43, 66, 67, 111, 112, 315, 316.) The argument to the jury that "the defense was syphilis" and that the defendant was "trying to put the stigma of indecency upon this young woman" was objected to in the District Court (R. 422, 434, 435) and it was assigned as error in the Circuit Court of Appeals. (R. 45, 46, 69-71.) The Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* applied in these cases and that the plaintiffs made a *prima facie* case and that the Court's charge to the jury was not incorrect. It further held that there was no justi-

fication for the assumption that the defense was syphilis, nor for the "verbal pyrotechnics that counsel were permitted to indulge in over the objection" of petitioner and that "this line of argument was likely to create prejudice," but nevertheless affirmed the judgments.

This Court has jurisdiction to grant writs of certiorari in these cases by virtue of Section 240 of the Judicial Code, as amended February 13, 1925. (28 U. S. C. A. 347; 43 Stat. 938.) The case of *Northern Ry. Co.* v. *Page*, 274 U. S. 65, is believed to sustain the jurisdiction of the Court. That case was considered on a writ of certiorari (269 U. S. 542) to the Circuit Court of Appeals for the First Circuit. It was an action to recover damages for personal injuries sustained by the plaintiff while a passenger on a railway train.

Statement of the Case.

Your petitioner respectfully refers to "Statement of the Case" set forth in the foregoing petition for certiorari, pages 2 to 5, which statement of the case is incorporated herein by reference. For convenience the respondents and petitioner will be called respectively, plaintiffs and defendant.

Specification of Assigned Error Intended to be Argued.

The errors intended to be argued are those heretofore mentioned and they may be briefly summarized and considered under these two headings:

1. The doctrine *res ipsa loquitur* was improperly applied to these cases. Without the presumption, invoked by virtue of this doctrine, there was no ground for holding the defendant liable.

2. The argument to the jury by plaintiff's counsel was prejudicial, deprived the defendant of a fair and impartial trial and entitles it to a reversal.

ARGUMENT.

I.

The doctrine, res ipsa loquitur was improperly applied in these cases.

A.

The mere happening of an injurious accident to a passenger without his fault does not raise the presumption of a carrier's negligence.

The Circuit Court of Appeals in these cases has held that when "a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was unusual and would not have happened" had the carrier used proper care. The cases cited by the Court demonstrate the incorrectness of this statement. In the earlier opinions of this Court there is language which, if considered apart from the facts and circumstances with reference to which the opinions were announced, might support the rule that proof of an injury to a passenger without fault on his part raises a presumption of negligence. After reviewing these cases, Judge Lurton said the following in *C. N. O. & T. P. Ry. Co.* v. *South Fork Coal Co.*, 139 Fed. 528, 533, cited by the Court:

> "Now it is clear that the learned justice did not mean that a presumption of negligence would arise upon mere proof of an injury to a passenger without any regard to the nature of the injury or the circumstances connecting the carrier with its infliction."

In *Transportation Company* v. *Downer*, 11 Wall. 129, 134, also cited by the Court, Mr. Justice Field said:

> "A presumption of negligence from the simple occurrence of an accident seldom arises, except where the

> accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

So also in *Sweeney* v. *Erving*, 228 U. S. 233, 238, also cited by the Court, this Court said:

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself. * * *"

In *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98, also cited by the Court, the rule *res ipsa loquitur* was thus stated:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It is apparent, therefore, that the test in determining whether this defendant's negligence may be presumed, is not whether an "accident" happened, but whether the circumstances of the occurrence were of a character to give ground for a reasonable inference that, if due care had been employed by the defendant, it would not have happened, or whether the "injury" is such as in the ordinary course of things does not occur, if the carrier uses proper care.

B.

The United States Courts have not extended the rule of *res ipsa loquitur* to cases where an injury is shown to have resulted from lurching, jerking or swaying of cars and neither the cases cited by the Circuit Court of Appeals nor the circumstances of this occurrence authorize its application in these cases.

The evidence shows that Imogene Johnson was sitting on the side of the berth near the pillows, leaning towards the suit case at the foot of the berth (R. 275) and reaching for their night clothes (R. 107-109), and Myrtle Johnson was standing in the aisle, her left hand on her hip, her right hand "sort of placed in the partition at the foot of the berth" (R. 108), and holding in this hand several folds of the curtain when the movements described by them occurred. These movements caused the former to fall across toward the foot of the berth (R. 108) and caused Myrtle Johnson to swing or pivot around with the curtain (R. 304, 306, 145) until her head struck the upper berth, after which she fell to the floor and was found sitting three or four feet from where she had been standing (R. 109). Both witnesses say they were thrown, but even so, there is nothing to indicate that the results were not those which might not naturally have followed such lurches as occur when a railroad company exercises that high degree of care required of it. Both ladies were in such positions that an ordinary lurch of the train could cause them to lose their balance. It would be natural for the one, under such circumstances, to fall forward in the direction in which she was reaching, and for the other to swing around, if after losing her equilibrium, she retained her hold on the curtain. After having struck her head, she, of course, fell. If she had been violently thrown, she would, without a doubt, have been some distance from the place she first occupied, instead of being about the distance from it which she would have traveled in pivoting around on the curtain.

We have carefully examined decisions of this Court and of lower federal courts and have found no case in which the doctrine *res ipsa loquitur* has been applied to such an occurrence as shown by the evidence in these cases. As indicated above, there are statements in opinions which, considered alone, would permit the application of the rule here but in the cases in which the rule was so broadly stated, the circumstances of the "accident" have been such that the presumption of negligence would have arisen therefrom.

One class of cases involves derailments, collisions and breaking of equipment or appliances. It is apparent that such accidents do not ordinarily occur if the carrier exercises that degree of care required of it. In them, it is said the accident itself is indicative of negligence.

There is another class of cases where the facts show that the train was suddenly started or suddenly stopped while the passenger was boarding or leaving the train. In them, it appears to us, the very question is whether it was negligent to start suddenly or to stop suddenly and thus deprive a passenger of a reasonable opportunity to board the train or to leave the train. There, mere proof of an unusual lurch or jerk is proof of negligence and no occasion for a presumption of negligence arises. But such cases do not support the application of the rule to the instant cases. Here the train was proceeding at its usual rate of speed between two stations (R. 393). The train was not stopping for a station nor was the plaintiff in the act of leaving the train.

We shall briefly review the cases cited by the Circuit Court of Appeals. As has been shown, the principles laid down in the cases of *San Juan Light & T. Co.* v. *Requena*, 224 U. S. 89; *Sweeney* v. *Erving*, 228 U. S. 233; *Transportation Company* v. *Downer*, 11 Wall. 129; and *C. N. O. & T. P. Ry. Co.* v. *South Fork Coal Company*, 139 Fed. 528, are the principles which we are contending for in the instant cases. The facts in these cases, however, do not aid in a solution of the ques-

tions here involved. The *Requena case* related to an injury caused by an electric shock; the *Sweeney case* to injuries caused by burns resulting from an X-ray operation and the *Downer case* involved the loss of a shipment of coffee transported on one of the defendant's boats.

In *Mendelson* v. *Davis* (8th C. C. A.), 281 Fed. 18, a passenger fell through an open trap-door and in *Lee Line Steamers* v. *Robinson* (6th C. C. A.), 218 Fed. 559, a passenger was stabbed by an employe of the carrier. In *C. C. C. & St. L. Ry. Co.* v. *Hadley*, 82 N. E. 1025, a passenger sustained injuries when a window fell on her because of a defective window catch.

C. N. O. & T. P. Ry. Co. v. *South Fork Coal Company*, 139 Fed. 528, involved the liability for destruction of timber by fire alleged to have been caused by the railroad company when oil contained in tank cars was ignited following a collision between two trains and the telescoping of the tank cars. In that case, Judge Lurton reviewed many cases relating to the subject under discussion. He examined *Stokes* v. *Saltonstall*, 13 Pet. 181, a case where a passenger was injured when a stage coach was upset, and *Railroad Company* v. *Pollard*, 22 Wall. 341, where a passenger was injured when, during switching operations, a car was bumped against the one she occupied, and demonstrated that these cases do not support the rule as it is stated by the Circuit Court of Appeals in these cases. Judge Lurton there said:

> "In passenger cases, as in other cases, the question at last is whether an inference of negligence may be logically inferred from the circumstances of the particular injury." (Citing authorities p. 534.)

and after discussing cases involving collisions, derailments, defective appliances and fires started by sparks, said:

> "But where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that that abnormal cause was not due to want of due care."

It will thus be seen that the cases cited by the lower court do not support its conclusions.

In *Chicago, M. & St. P. Ry. Co.* v. *Irving*, (9th C. C. A.), 234 Fed. 562, 566, the Court quotes the following from *Griffen* v. *Manice*, 166 N. Y. 188, 59 N. E. 925:

> "If a passenger in a car is injured by striking the seat in front of him, that, of itself, authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence."

A significant characteristic of collision, derailment and defective appliance cases is that in them there is a physical change of position or condition of the train or the car of such a character as enables a witness to reproduce by language a true picture thereof and this change in turn having injured the plaintiff, an explanation is demanded of the carrier, not as to why the passenger fell or was injured, but an explanation as to what caused its cars to leave the track, or what caused its train to collide with another train or vehicle, or what caused its equipment or appliances to give way. The distinction made between such cases and the instant cases is that in the former there is evidence of a physical fact, whereas in the latter, there is merely an expression of opinion as to the nature and character of a momentary sensation. The former obviously furnishes something definite upon which to base an inference, while the latter leaves the matter in the realm of conjecture and speculation. "No inference of fact or of law is reliable drawn from premises which are uncertain." *U. S.* v. *Rose*, 92 U. S. 281, 283.

Furthermore, a collision, derailment or the breaking of appliances does not ordinarily occur, except when the carrier is negligent, but it is a matter of common knowledge that lurching, jerking and swaying of cars takes place on all fast trains. The possibility of such movements is an ordinary incident of railroad travel—a consequence of the operation of counteracting forces—which a passenger must expect. That the movements described in the instant cases were acts of negligence or evidence of negligence is a matter of speculation and not a legitimate inference. This Court has held that a verdict cannot be sustained if essential facts are left in the realm of conjecture and speculation. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 73; *Gulf M. & N. R. Co.* v. *Wells*, ... U. S. ....., 72 L. Ed. 152, 154.

In the last mentioned case, it was urged that the question of negligence was properly submitted to the jury because of an inference to be drawn from plaintiff's statement that "the engine gave an unusual jerk" which was more severe than any he had ever seen or experienced on a local freight train. This Court refused to sustain that contention, holding that plaintiff's statement was "obviously, a mere conjecture," and his opinion that the jerk was unusual and severe "had no substantial weight." There were circumstances in that case which are not present in the instant cases. However, it has been repeatedly held by courts of high authority that statements describing a lurch, jolt or jar as "violent," "terrible," "awful," "very severe," "unexpected," "extraordinary," "unusual," and "worse than usual," unless accompanied by evidence showing negligence, are insufficient to make a case. They are said to be mere expletive or declamatory words or phrases, "depending generally upon the degree of nervous emotion, exuberance of diction and volatility of imagination of the witness," and not evidence of physical facts. *Foley* v. *B. & M. R. Co.*, 193 Mass. 332, 335, 79 N. E. 765; *Bollinger* v. *Railway Co.*, 98 N. Y. S. 641; *Wein-*

schenk v. *Railroad Co.*, 190 Mass. 250, 76 N. E. 662; *Delaney* v. *Buffalo R. & P. Ry. Co.*, 266 Pa. 122, 109 Atl. 605; *Walsh* v. *Boston El. Ry.*, 256 Mass. 17, 152 N. E. 64.

Where, as in the instant cases, the circumstances attending the occurrence are at least as consonant with full performance by the carrier of its duty as that it was negligent, there can be no logical inference of negligence from the occurrence itself and it ought not to be left to the conjecture of a jury.

C.

The decision of the Circuit Court of Appeals conflicts with applicable decisions of other Circuit Courts of Appeals.

In *Norfolk & W. Ry. Co.* v. *Birchett* (4th C. C. A.), 252 Fed. 512, the plaintiff had secured a judgment in the lower court which was reversed by the Circuit Court of Appeals. The accident occurred while the plaintiff, who had traveled a good deal, was in the dressing room of the Pullman car. She testified that she was firmly seated in a chair, when a "terrific lurch" came and "just threw her across the room" —just as if a football had been kicked across the room. The chair was overturned. She describes the lurch as "great," "violent" and as occurring very suddenly. The Court there said:

> "The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. • • • The doctrine of *res ipsa loquitur*, upon which plaintiff really relies, has but limited application to a case of this kind. The injury for which she sues did not result from collision or derailment, or from the improper character or unsafe condition of any part of the train equipment. It must have been occasioned, as seems to us clearly established, by one or more of those

car movements or motions, by whatever name called, which necessarily attend the most careful operation of fast passenger trains. In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. *Herstine* v. *Lehigh Valley R. Co.*, 151 Pa. 244, 25 Atl. 104; *Weinschenk* v. *N. Y., N. H. & H. R. R. Co.*, 190 Mass. 250, 76 N. E. 662; *Denver & R. G. R. Co.* v. *Fotheringham*, 17 Colo. App. 410, 68 Pac. 978; *Nelson* v. *Lehigh Valley R. Co.*, 25 App. Div. 535; 50 N. Y. Supp. 63."

The Court thereupon quotes from cases and also shows that its ruling is not in conflict with *Railroad Company* v. *Pollard*, 22 Wall. 341, or *Stokes* v. *Saltonstall*, 13 Pet. 181, and concludes as follows:

"The plaintiff has cited no authority, and we have found none, which sustains her contention. The fact that she fell, under circumstances not seriously in dispute, does not make out a prima facie case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred."

In *Ozanne* v. *Illinois Central R. Co.*, 151 Fed. 900 (affirmed by Circuit Court of Appeals for Sixth Circuit (157 Fed. 1004), a verdict was directed for the defendant. There the plaintiff was in the ladies' dressing room of a Pullman car when the car lurched or swerved, causing her to fall and break her hip. The Court there said:

"But whilst the carrier must rigidly perform all of these duties, the natural laws of motion superadd risks which the carrier cannot always guard against, even by the use of the utmost care, and such risks as those the passenger must be supposed to assume. The railroad track cannot always be straight. The transit of its trains must be rapid, and the swing of a car is inevitable when the train passes over a curve. This is unavoidable, and the consequences of it is one of the risks we have referred to. To say the least, the testimony in this case is overwhelming, if indeed it is not entirely uncontradicted, that the defendant, in respect to its cars, its

trains, and the management thereof, came up to the standard of duty just indicated. In any event, the testimony is clear that no sort of negligence can fairly be imputed to the defendant, although, as we have seen, it is essential to entitle a plaintiff to recover to show by substantive proof that there was some negligence."

To cite decisions of State Courts supporting the above cases would unduly lengthen this argument.

II

The prejudicial argument to the jury deprived the defendant of its right to a fair and impartial trial.

Over the objections and exceptions of defendant's attorney, and without "justification for their assumption" plaintiff's counsel made the following argument to the jury:

"But gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 421-422.)

"Now, I want to get some more things to you. You note that Mr. Chilcott said in his opening statement: 'I only know from rumor what the defense in this case may be, but we will be able to meet it'; and just the moment that counsel for the defendant began to interrogate these witnesses with reference to the condition of the blood I made up my mind I would meet it right there. They never for one minute had an idea that we would put Dr. Geraughty on the stand, so that they couldn't come before this jury and say, 'Why didn't you bring that man?' You mean to tell me when a man knows all about arach-

noids and pia mater and dura mater and all about those things, that he hadn't prepared this defense and worked it out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 434.)

There is nothing in the record showing that the subject of syphilis was introduced by the defendant, or that its defense was syphilis. Indeed, counsel for the plaintiffs, who had been "long in this business of trying lawsuits" must have known that there could be no such defense in this case. (*Mathew* v. *Wabash R. Co.*, 78 S. W. 271, 115 Mo. App. 468, affd. 199 U. S. 605. The Little Silver, 189 Fed. 980, 986; *Hilliard* v. *Chicago R. Co.*, 163 Ill. App. 282, 289.) By this argument counsel sought to make the jury believe that the defendant was charging this woman with this loathsome venereal disease. The effect of such argument was obviously to prejudice the jury against the defendant not only on the question of damages—the full amount sued for was returned in each case—but on the question of liability. If the theory of the Circuit Court of Appeals and the trial Court is correct, namely, that the jury might infer negligence from the occurrence, obviously the defendant was prejudiced the more by such argument. The Circuit Court of Appeals states: "We therefore deem it proper to observe that this line of argument was likely to create prejudice" and nevertheless affirmed the judgments.

In so doing, it so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. The late Judge Sanborn in *Union Pacific R. Co.* v. *Field*, 137 Fed. 14, 15, said the following:

> "Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty or a persistent violation of it, is a fatal error, because it makes the trial unfair. The property of a defendant may not be lawfully transferred to a plaintiff without an impartial trial of the controversies between them. A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client. * * *
>
> It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice; and yet in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts it is only when it is certain that these have been withdrawn that the trial is fair and impartial. It is therefore of the gravest importance that the conveyance of such suggestions to their minds should be prevented at the very threshold of the attempt, and that court and counsel should guard the jury with zealous care against all illegal, improper, or unfair arguments or suggestions. *Waldron* v. *Waldron*, 156 U. S. 361, 367, 383, 384, 15 Sup. Ct. 383, 39 L. Ed. 453; *Graves* v. *U. S.*, 150 U. S. 118, 120, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Hall* v. *U. S.*, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003; *Wilson* v. *U. S.*, 149 U. S. 60, 68, 13 Sup. Ct. 765, 37 L. Ed. 650; *St. Louis*

& S. F. Ry. Co. v. *Farr*, 6 C. C. A. 211, 216, 217, 56 Fed. 994, 1000; *St. Louis & S. F. Ry. Co.* v. *Bennett*, 16 C. C. A. 300, 305, 69 Fed. 525, 529, 530; *Cudahy Packing Co.* v. *Skoumal*, 60 C. C. A. 306, 313, 125 Fed. 470, 477; *Bullard* v. *Boston & M. R. Co.*, 64 N. H. 27, 5 Atl. 838, 840, 10 Am. St. Rep. 367; *Perkins* v. *Burley*, 64 N. H. 524, 15 Atl. 21; *Magoon* v. *Boston & M. R. Co.* (Vt.) 31 Atl. 156, 163; *State* v. *Hamett*, 54 Vt. 83, 89; *Brown* v. *Swineford*, 44 Wis. 282, 294, 28 Am. Rep. 582; *Mitchum* v. *State of Georgie*, 11 Ga. 615."

Writs of certiorari should be granted and review of these cases should be permitted to correct these errors.

1. The Circuit Court of Appeals has decided an important question of general law, in a way conflicting with decisions of the Supreme Court of the United States in that the Circuit Court of Appeals has stated that the fact that a passenger is injured without negligence on his part raises a presumption of negligence on the carrier's part, whereas this Court has held that in addition to the above it must appear that the injury is such as in the ordinary course of things does not occur, if the one having control uses proper care.

2. The Circuit Court of Appeals by its decision thus conflicting with decisions of this honorable Court has erroneously applied the doctrine of *res ipsa loquitur* to the facts in those cases.

3. The Circuit Court of Appeals in its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals, in that by its decision it has held that evidence of a physical injury to a passenger in a car under the control of a carrier, together with statements that such injury was caused by the lurching and swaying of the car in which the passenger was riding is sufficient to make a *prima facie* case, whereas the Circuit Court of Appeals for the fourth and sixth circuits have held that proof of such injury, together with such state-

ments does not bring a case within the doctrine of *res ipsa loquitur* and in the absence of evidence of the carrier's negligence does not entitle a passenger to damages.

4. The Circuit Court of Appeals by its decision, holding that the improper argument to the jury by both counsel for respondents was likely to create prejudice and its inconsistent order affirming the judgments of the lower courts, has so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

APPENDIX.

Opinion of Circuit Court of Appeals.

Before Kenyon, Circuit Judge, and Symes and Martineau, District Judges.

Symes, District Judge, delivered the opinion of the Court.

These two cases are here by separate writs of error sued out by the railroad company, from separate judgments entered in the District Court of the United States for the Western District of Missouri, in favor of the respective plaintiffs below, defendants in error here. The two actions were consolidated, tried as one, and the errors complained of are the same in both.

No. 8020 was brought by Edward H. Johnson to recover damages, as the husband of Myrtle J. Johnson, for injuries alleged to have been sustained by her, while riding on one of defendant's trains as a passenger, by reason of alleged negligence of the railroad company.

In No. 8021, Myrtle J. Johnson, plaintiff below, seeks to recover damages alleged to have been suffered by her, by reason of the same alleged negligence of the railroad company.

Myrtle J. Johnson, in company with her sister-in-law, Imogene Johnson, was riding on a so-called "extra fare, solid Pullman train" of the defendant company, en route from Harmon, New York, to Chicago, Illinois. The ladies spent the evening in the club car and between 11 and 12 P. M. repaired to their berth, lower 8, car 64, located on the right hand side of the train as it traveled west. Imogene Johnson seated herself on the edge of the berth with a suitcase open

before her, taking out their night clothes, when, according to the evidence of the two ladies, the speed of the train was suddenly checked, and then accelerated. At the same time Myrtle J. Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtains in order to steady herself, facing and talking to Imogene. The two women describe what happened as a terrible jerk, as though the train was going to stop, but did not; then a yank, and that the train lurched as it went on again. Imogene Johnson fell across the berth and towards the foot, while Myrtle was thrown three or four feet into the aisle of the sleeper towards the opposite berth. Myrtle testified:

"I was standing there holding on to the curtain with my right hand; had it just below the upper berth, just holding it below the upper berth and securing it on the board that separates the two berths and my left hand on my hip. The train gave an awful jerk and jolt and a terrible lurch. And I had my hand hold of the curtain just below the lower part of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on my hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw my head up against the edges of the upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor."

Imogene said:

"This was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced. The sudden lurch, * * * swung her (Myrtle) around. She was trying to hang on to the curtain." Imogene scrambled to her feet, and according to her testimony, heard Myrtle moaning, and found her

"rocking back and forth in the aisle, saying 'Oh my head, Oh my head,'" etc.

She assisted Myrtle up and into the berth, rubbed her head, talked to her, helped her to undress and get to bed. There were no other eye-witnesses to these happenings.

The two ladies occupied the same berth and slept till nearly noon the next morning. Imogene says that upon awakening she found Myrtle paralyzed on her entire right side. Her face was drawn as if something had pulled it to one side, and she was uttering inarticulate sobs, crying, etc.

A doctor was not obtainable until the arrival of the train at Chicago. Myrtle Johnson was carried out of the Pullman, put in a wheel chair, taken to another station, and with her companion boarded the Santa Fe train to Kansas City. Upon her arrival there she was taken to Grace Hospital. According to Imogene Johnson "Up to this time Myrtle was unable to talk, one-half of her tongue being paralyzed."

The case was diagnosed as odema of the brain, resulting from injury, causing a partial paralysis of the right side.

The members of the train crew, *i. e.*, the conductor, porter, maid and brakeman, testifying for the railroad company, said they did not recall any unusual jar or sudden jerk at the time in question. It is sufficient to say that there was a square conflict of evidence as to the actual happenings. The evidence of these employees, who were not eye-witnesses, was necessarily of a negative character, nor was the matter called to their attention until sometime later. Separate verdicts were rendered in favor of Myrtle Johnson and Edward Johnson.

Thirty alleged errors in the conduct of the trial are set out in the specifications. Those requiring attention may be classified under three heads. 1. Refusal of the court to direct a peremptory verdict in favor of the defendant at the close of the plaintiff's case, and at the close of all the evidence. 2. The admission of incompetent evidence offered by the plaintiff. 3. Improper argument to the jury by counsel for the plaintiff. The specifications of error are practically identical in both cases.

1. **The sole question here is: Had the plaintiff established a prima facie case, and if so, was this situation changed at the conclusion of all the evidence?**

The plaintiff and her sister-in-law gave a most graphic description of the accident. That the plaintiff was thrown, and suffered injuries of a more or less grievous and permanent nature, is not disputed. So we inquire: Did the accident result from some unusual or extraordinary happening; such as a sudden stopping, starting or jerking of the train; beyond what might ordinarily be expected by passenger under all the surrounding circumstances, which include the usual and necessary starting, stopping, high rate of speed, inevitable rocking, swaying, etc., of the modern passenger train?

The plaintiff and her co-witness qualified by stating they had had wide experience in traveling on railroad trains of a similar nature and kind. We see no reason why they were not competent to state in their own way just what occurred, and the results thereof. That a passenger on public conveyances is qualified to state his experiences, observations, and the phenomena ordinarily incident to a railroad journey, such as testified to by these two ladies, has long been settled. The usual movements of a train, referred to above, do not constitute negligence, and the risks thereof are assumed by the passenger. The plaintiff's evidence is that this particular accident resulted from a slackening and jerk, or swaying of a most extraordinary and unusual character.

Counsel discuss the doctrine of res ipsa loquitur, "the thing itself speaks." The Federal courts have decided that it applies to cases of this character. That is; the train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating the train that the law imposes upon it. It therefore follows in the instant case that

the plaintiff having made a prima facie case, a legal presumption arises under the doctrine above mentioned in favor of the plaintiff, which it became incumbent upon the defendant to explain or meet, but not necessarily by a preponderance of the evidence, because the burden of proving negligence is at all times upon the plaintiff. *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89; *Sweeney* v. *Erving*, 228 U. S. 233; *William B. Stokes* v. *Francis Saltonstall*, 13 Pet. 181; *Cincinnati, N. O. & T. P. Ry. Co.* v. *South Fork Coal Co.*, 139 Fed. 528; *Railroad Company* v. *Pollard*, 22 Wall. 341; *Transportation Company* v. *Downer*, 11 Wall. 129; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Company* v. *Hadley*, 16 L. R. A. (N. S.) 527, 82 N. E. 1025. This it attempted to do, and thus made an issue of fact for the jury under proper instructions. The court told the jury that the railroad company was not an insurer of the safety of its passengers; that the latter are not entitled to recover damages merely by showing they were injured; that the carrier was only liable for negligence in exercising that high degree of care that the law imposes upon it; and that there could be no recovery unless the jury found by a preponderance of the testimony that the injury was caused by an extraordinary and unusual lurching, etc., of the train, and not then, unless the same was caused by the defendant's negligence, and that the burden was upon the plaintiff to prove his case. The correctness of all this was not, for reasons we have stated, affected by the further instruction that if the injury was directly caused by an extraordinary lurching and jerking, the plaintiff need not go further and prove what negligence, if any, caused that lurching, the law presuming that an extraordinary occurrence of this kind was due to the fault of the carrier; but that this presumption was rebuttable, and not conclusive. *Mendelson* v. *Davis*, 281 Fed. 18; *Lee Line Steamers* v. *Robinson*, 218 Fed. 559.

The railroad company did not charge contributory negligence.

2. The several specifications under this heading are based upon objections made to hypothetical questions submitted to medical experts. These witnesses qualified professionally, and it was therefore proper to ask them what their judgment would be upon all, or any part of the facts that have some support in the record, provided a sufficient number of facts are assumed to enable the witness to give an intelligent opinion. The form of questions of this character rests largely in the sound discretion of the trial court, and may be so framed as to reflect the theory of the party propounding them. A question otherwise proper is not rendered improper for the reason that certain additional facts might have been put in which would assist such witness in giving a more satisfactory answer. The jury, no doubt, understood that these questions were hypothetical; that is, based on assumed facts, so there was no invasion of the peculiar province of the jury to decide the ultimate issues. A qualified physician or surgeon may state the results of specific occurrences on the body. *Wheeler* v. *Chicago & W. I. R. Co., et al.*, 108 N. E. 330, and the extent and character of the disability resulting therefrom, and whether certain conduct is consistent with having sustained particular injuries. *Scott* v. *The Homesteaders*, 129 N. W. 310.

Likewise, it has been held that an osteopath is competent to express an opinion on the injury or disease, and the treatment thereof. *Barnes* v. *Danville Street Ry.*, 235 Ill. 566; 22 C. J. 677; 22 C. J. 543; *Macon Ry. & Light Co.* v. *Mason*, 51 S. E. 569.

3. Both counsel for the plaintiff who addressed the jury, stated that the defense charged that:

"The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis."

And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We therefore deem it proper to observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties.

The record containing no reversible errors, the judgment in each of the two cases is *Affirmed.*

Office Supreme Court, U. S.
FILED
FEB 21 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 455

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

EDWARD H. JOHNSON,
Respondent.

No. 456

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MYRTLE J. JOHNSON,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR THE PETITIONER, NEW YORK CENTRAL RAILROAD COMPANY.

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

BARNUM & LOCKE CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Reference to report of opinion of lower court	1
Grounds on which jurisdiction is invoked	1
(a) Statutory provision believed to sustain jurisdiction	1
(b) Date of judgments and date of applications for certiorari	2
(c) Nature of case and rulings of lower court relied upon as a basis of this Court's jurisdiction	2
(d) Cases believed to sustain this Court's jurisdiction	2
Statement of the case	3
Specification of assigned error intended to be argued	4
Argument	5-23
Appendix	23-42

Summary of Argument.

The arguments to the jury by plaintiffs' counsel were so unfairly prejudicial to the defendant as to justify a new trial 5-23

Appendix.

There was no justification for the charge that the defense was that Myrtle Johnson had the syphilis 25-37

The argument when objected to required a prompt rebuke from the trial Court. Failure so to do was an abuse of discretion 38, 39

The objections and exceptions of the defendant were sufficient to preserve its rights 39-42

PAGE

Cases Cited.

Baldwin v. Grand T. R. Co., 64 N. H. 596, 15 Atl. 411 8

Buckley v. Boston El. Ry. Co., 215 Mass. 50, 102 N. E. 75 8

Cherry Creek National Bank v. Fidelity Insurance Co., 207 App. Div. 787, 202 N. Y. S. 611 20

Dernberger v. B. & O. R. Co., 234 Fed. 405, aff'd 243 Fed. 21 8

Eilers v. Peoria Railway Company, 200 Ill. App. 487, 494 7

Galveston Electric Co. v. Dobbert, (Tex.) 127 S. W. 838 8

Gibbons v. Pennsylvania R. Co., 291 Pa. 141, 139 Atl. 743 22

Gold Mines Co. v. Bird (Ariz.), 260 Pac. 191 11

Gulf, C. & S. F. Ry. Co. v. Butcher, 18 S. W. 583, 584 ... 15

Haake v. G. H. Dulle Milling Co., 168 Mo. App. 177, 153 S. W. 74, 75 15

Hall v. United States, 150 U. S. 76, 81 15

Henry v. Illinois Cent. R. Co. (Mo. Sup.), 3 S. W. (2d) 1004 6

Higgins v. Stang (Wis.), 218 N. W. 832 11

Hinchman v. Pere Marquette R. Co., 136 Mich. 341, 99 N. W. 277 6

Illinois Power & Light Corp. v. Lyon, 311 Ill. 123, 142 N. E. 456 15

Jackman v. St. Louis & H. Ry. Co., 200 Mo. App. 368, 206 S. W. 244, 246 20

Kansas C. Ft. S. & M. R. Co. v. Sokol, 61 Ark. 130, 32 S. W. 497 6

Keenan v. Met. St. Ry. Co., 103 N. Y. S. 61 6

Kirkpatrick v. Wells, 6 S. W. (2d) 591 19

London v. Bay State St. Ry. Co., 231 Mass. 480, 121 N. E. 394, 396 ..... 18, 19

Monroe v. Chicago & A. R. Co., 297 Mo. 633, 249 S. W. 644 11

PAGE

Northern Ry. Co. v. Page, 274 U. S. 65 2

People v. Fielding, 158 N. Y. 542, 53 N. E. 497.....19, 23, 42

Stewart v. Met. St. Ry. Co., 72 App. Div. 459, 76 N. Y. S. 540 8

Stone v. Sinclair R. Co., 235 Mich. 53, 209 N. W. 118..... 10

Stutz v. Milligan, (Mo. App.) 223 S. W. 128 11

Union Pacific R. Co. v. Field, 137 Fed. 14, 15 .....16, 18

Volkmor v. United States, 6th C. C. A., 13 F. (2d) 594, 595 41

Waldron v. Waldron, 156 U. S. 361, 380, 383 .....2, 16

Weaver v. Winchell, 116 Kan. 296, 226 Pac. 719 8

Wilson v. United States, 149 U. S. 60 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

No. 455

NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

EDWARD H. JOHNSON,

Respondent.

No. 456

NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

MYRTLE J. JOHNSON,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR THE PETITIONER, NEW YORK CENTRAL RAILROAD COMPANY.

The opinion of the Circuit Court of Appeals in these cases is reported in 27 Federal Reporter, 2d Series, page 699, and is also found at page 467 of the Transcript of Record.

Grounds on which Jurisdiction of this Court is invoked.

(*a*) Section 240 of the Judicial Code as amended February 13, 1925, (28 U. S. C. A. 347; 43 Stat. 938) sustains the jurisdiction of this Court to review these cases by certiorari.

(*b*) The opinion and orders of the Circuit Court of Appeals affirming the judgments of the District Court were filed and entered July 2, 1928 (R. 467, 472, 473). A petition for writs of certiorari was filed in this court on September 20, 1928, and on October 15, 1928, writs of certiorari were granted (R. 473, 474).

(*c*) These cases were actions for damages alleged to have been sustained by Myrtle J. Johnson and Edward H. Johnson, her husband, because of personal injuries suffered by the respondent, Myrtle J. Johnson, while a passenger on one of petitioner's trains (R. 5, 8). They were tried together in the District Court of the United States for the Western District of Missouri, Western Division. Both of respondents' counsel in their argument to the jury stated that "the defense was syphilis" and argued that the petitioner "was trying to put the stigma of indecency upon" the respondent, Myrtle Johnson. (R. 412, 413, 415, 426). Objections to this line of argument were made and overruled to which exception was taken (R. 412, 413, 426). The ruling of the trial Court in this respect was assigned as error in the Circuit Court of Appeals (R. 44, 45, 71, 72). The Circuit Court of Appeals held that there was no justification for the assumption that the defense was syphilis or that the petitioner made these charges against Myrtle Johnson, nor for the "verbal pyrotechnics that counsel were permitted to indulge in" over petitioner's objection and that "this line of argument was likely to create prejudice," but nevertheless affirmed the judgments of the lower court (R. 472).

(*d*) *Waldron* v. *Waldron*, 156 U. S. 361 and *Northern Ry. Co.* v. *Page*, 274 U. S. 65, are believed to sustain the jurisdiction of the Court.

Statement of the Case.

For convenience, the respondents and petitioner will be called respectively plaintiffs and defendant.

The petitions in each case charged that while Myrtle J. Johnson was a passenger for hire, the defendant negligently caused and permitted the car in which she was riding to "suddenly, violently and unusually surge, lurch, jerk, jolt, sway, tilt and rock" as a result of which negligence she was caused to fall and thereby injured (R. 6-8).

The evidence tended to show that between 11:00 and 12:00 o'clock in the evening, after all but the night lights had been extinguished (R. 105), Myrtle J. Johnson and her sister-in-law, Imogene Johnson, who were passengers on one of defendant's fast trains enroute from Harmon, New York, to Chicago, left the club car of the train and went to their berth to retire for the night (R. 105). While Imogene Johnson was seated on the side of the berth, reaching for her night clothes, which were in a suitcase at the foot of the berth (R. 238), and while Myrtle Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtain (R. 106, 237), there came what the former described as "the most terrible jerk, almost as though the train were going to stop, but didn't, and jerked and swayed and went on" (R. 107), and what the latter described as "an awful jerk and jolt and a terrible lurch" (R. 238). These movements, Myrtle Johnson testified, threw her body around and her head against the edge of the upper berth (R. 240). Imogene Johnson assisted her to bed, where both ladies slept until nearly noon the next day (R. 151). Imogene Johnson, upon awakening, found that her sister-in-law was ill (R. 113). While a total of twenty-one witnesses testified for the respondents in regard to the physical condition of Myrtle Johnson, there were no witnesses to the actual occurrence except these two ladies. Six members of the train crew, however, testified that there was no unusual jerk or jar. (R. 384, 377-378, 367, 370, 380, 396.) The train was running at its usual rate of speed (R. 378).

In their address to the jury both counsel for the plaintiffs stated that the defense was that Myrtle Johnson had the syphilis and such statements as these were made:

> "The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 412, 413.)
>
> "Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 426.)

and, as the Circuit Court of Appeals states, counsel proceeded to dilate on and exploit this text *with no justification for the assumption* or for the verbal pyrotechnics that they were permitted to indulge in over the objections of defendant's attorney.

Objections were made to the above mentioned argument to the jury and to the introduction of evidence (R. 96, 110, 288, 357, 21, 409) and the giving of instructions to the jury applying the doctrine of *res ipsa loquitur* to these cases. (R. 444-452.) The jury brought in verdicts for the plaintiffs for the full amount sued for in each case—$25,000 in Myrtle Johnson's case and $10,000 in her husband's case—upon which verdicts judgments were entered (R. 22). On writs of error, review was had by the Circuit Court of Appeals, Eighth Circuit, and that Court, on July 2, 1928, affirmed both judgments. (R. 473.)

Specification of Assigned Error Intended to be Argued.

In compliance with the order of this Court the error intended to be argued is that misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial.

ARGUMENT.

The arguments to the jury by plaintiffs' counsel were so unfairly prejudicial to the defendant as to justify a new trial.

We might cite a great array of authorities to the effect that it is an abuse of the high prerogative of an attorney in his argument to the jury to appeal to prejudice irrelevant to the case or to introduce arguments that are not supported by the evidence and that such action constitutes error entitling the opposite party to a reversal. We assume, however, that the correctness of the general rule is not here involved, and shall therefore concern ourselves with the question whether the arguments of counsel for the plaintiffs in the cases at bar were so unfairly prejudicial to the defendant as to entitle it to a new trial. The Circuit Court of Appeals said the following in regard to this matter:

> "Both counsel for the plaintiff who addressed the jury stated that the defense charged that:
>
> 'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.'
>
> And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct

examination. We therefore deem it proper to observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties."

We begin then with these propositions established: (*a*) that there was no justification for the assumption that the defense in this case, was that Myrtle Johnson had the syphilis; (*b*) that there was no justification for the "verbal pyrotechnics that counsel was permitted to indulge in"; (*c*) that these were made over the objection of the defendant; and (*d*) that this line of argument was likely to create prejudice and did not aid the *Court* or *jury* in the performance of their duties.* In order to come to a proper determination of the question whether the arguments justified a new trial, a few of the circumstances of these cases should be considered. First of all, it is important to bear in mind that both lower courts applied the doctrine, *res ipsa loquitur*—liability was predicated solely on a presumption of negligence and this presumption was based on conflicting circumstantial evidence. This Court did not allow certiorari on this point and we do not propose to again argue it but we merely desire to emphasize the fact that since the jury was permitted to infer negligence from the circumstances of the occurrence when there was no direct evidence of negligence and when six members of the train crew testified that as far as they knew there was no unusual jerk or jar (R. 384, 377-378, 367, 370, 380, 386), that these cases required especial care from Court and counsel in order that the jury might be able to decide the issues submitted to them impartially as between party and party and that a fair trial might result.

Another element which should be considered is that in cases of this character there is a natural prejudice against

*In respondent's brief, in opposition to the issuance of writs of certiorari issue was taken with some of these propositions. Out of an abundance of caution, we have argued them in the Appendix hereto.

corporations. In *Eilers* v. *Peoria Railway Company*, 200 Ill. App. 487, 494, the following is quoted from *Illinois Cent. R. Co.* v. *Seitz*, 111 Ill. App. 242:

> "There is enough natural and inherent prejudice in the minds of jurors against railroad and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion or prejudice of jurors. A lawyer who tries his case in a proper manner, observing the ethics of the profession, is at a great temporary disadvantage when trying a cause against counsel who resort to improper language to obtain a verdict. Verdicts thus obtained generally are and always should be short-lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discourage such misconduct on the part of lawyers by reversing judgments obtained by them when it is manifest they are the result of unprofessional conduct." (Cited with approval in *Paulsen* v. *McAvoy Brewing Co.*, 220 Ill. App. 273, 290.)

This natural prejudice was not diminished by such statements as these in the argument to the jury:

> " • • • this whole defense is a *claim agent defense*, prepared by the claim department of the New York Central Railroad" (R. 411-412).
>
> "I resent the New York Central *coming into this town*, etc." (R. 413.)
>
> "I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him and I know the obstacles that confront him as local counsel for *an eastern railroad*, the defense in a case of which is prepared by a claim department and handed on to him to try. It is especially hard for him because he knows those two young women, and, as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he *is required to follow the dictates of some claim department*." (An objection to this statement was overruled. R. 424.)
>
> "Now, what do you understand from these witnesses *sent on here from New York* • • • "(R. 425.)
>
> "He (Mr. Marley) read the files in this case *sent on from New York*." (R. 425.)

"They knew immediately the Pullman reservations, as you know from common sense, showing the names of the persons occupying the berths in that train. They knew of this case right away. Common sense tells you, from your experience of life, that all they had to do was to look there and get the names of the other people on that train. Did they get them? Did they bring them all here? No. Why? The reason is obvious." (R. 425.)

"You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central?" (Rec. 426.)*

There is also a very natural sympathy for the injured person in actions of this nature. In *Dernberger* v. *B. & O. R. Co.*, 234 Fed. 405, affirmed 243 Fed. 21, the Court said:

"In the practical enforcement of the law in negligence cases, certain psychological conditions exist that do not exist in the trial of other cases, or, at least, exist in a much more accentuated and acute degree. Some one has been injured, has endured pain, has in case of death been deprived of the association, support, and affection of a near relative. Human nature at once calls forth regret and sympathy from court, counsel, jury, and all those who may hear the fact of there having been such accident. In most cases three distinct classes are involved: First, the plaintiff, who has suffered; second, the impersonal corporation; and, third, the latter's employe or employes by whose alleged negligence the injury resulted. If a corporation, as is usually the case, the defendant in the mind of average jurors is conceived

---

*In the arguments to the jury, there appears to be a subtle appeal to sectional or local prejudices. Such appeal is, of course, improper. There is a charge that the trial attorney was required to follow the dictates of the defendant's claim department and that this was a "claim agent defense." There was no evidence to support this charge. It was improper and prejudicial. *Galveston Electric Co.* v. *Dobbert*, (Tex.) 127 S. W. 538; Cf. *Henry* v. *Illinois Cent. R. Co.* (Mo. Sup.) 3 S. W. (2d) 1004. There was no evidence that the defendant had the names of the other passengers. Such argument has been held prejudicial error. *Kansas C. Ft. S. & M. R. Co.* v. *Sokol*, 61 Ark. 130, 32 S. W. 497; *Stewart* v. *Met. St. Ry. Co.*, 72 App. Div. 459, 76 N. Y. S. 540; *Kernan* v. *Met. St. Ry. Co.*, 103 N. Y. S. 61; *Buckley* v. *Boston El. Ry. Co.*, 215 Mass. 50, 102 N. E. 75. Commenting on the rejected testimony was improper. *Weaver* v. *Winchell*, 116 Kans. 296, 226 Pac. 719; *Hinchman* v. *Pere Marquette R. Co.*, 136 Mich. 341, 99 N. W. 277; *Baldwin* v. *Grand T. R. Co.*, 64 N. H. 596, 15 Atl. 411.

to be endowed with large wealth and with unusual potentialities to defend and litigate, while the plaintiff is a personality, poor and helpless, and deprived to a degree at least, of his original means of caring for himself.

In the trial of the case, it takes a degree of self-restraint, hard to obtain in jurors, and more or less in judges, too, necessary to prevent them from unconsciously determining to help and decide for the injured plaintiff, if any excuse can be found for so doing."

All of these considerations require that the trial of such cases be as free from argument that might create passion or prejudice as is possible. But there were other circumstances which required temperate argument. Twenty-one witnesses testified for the plaintiffs as to the physical condition of Myrtle Johnson. Indeed the trial Judge, in his charge to the jury, in commenting on this matter, said:

"While the testimony has taken two days and the attorneys in the case have tried the case expeditiously on their part, it has revolved about two subjects only, as I view it; one the cause of the plaintiff's injury, the other the extent and nature of her injury. The testimony concerning the cause of the plaintiff's injury, if it had all been presented at one time, would not have taken more than five minutes, because most of the testimony in the case was concerning the nature of the injury." (R. 437.)

Myrtle Johnson showed the jury how the injury had affected her ability to walk (R. 251) and, according to the argument of her counsel (R. 429) "burst into tears and sobbed" when she was on the witness stand. This undue emphasis of her injuries was enhanced by counsel's arguments to the jury. We find such statements as these, in the argument to the jury for the plaintiffs:

"It resulted in the tragedy which has wrecked that girl's life, a tragedy which has caused her to be a hopeless cripple for the rest of her life and plunged her into an abyss of darkness." (R. 411.)

"We are suing this company for $25,000. for this girl, who will be a cripple the rest of her life, who will forever drag that foot, who will never be able to dance, who will never be able to sing, who will never be able to play the piano, who will never be able to be a wife to her husband; never in this world gentlemen * * * You can see how she walks. She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish." (R. 415.)

"I know that you will return a verdict for this plaintiff which will speak the truth and which will compensate her, as far as money can compensate her, for the injuries which she has received; and I will say this, that no money, no amount of money, will ever bring back to her the youth and beauty which she had in the first flush of glorious womanhood, that she had when she went there to New York and returned a hopeless cripple, to be a hopeless cripple the rest of her life."* (R. 416.)

"Oh, I wish I had an hour to talk to you.

'Life isn't life without hope;
It is but a lingering torment,
An image of death.'

'The memory of joy is not joy;
Sorrow's memory is sorry still.'"

"Think of it. Every day of that woman's life, from the time she arises in the morning, the constant realization, 'I am no longer myself; I am but a wreck of my former self; I can't cook, cut my food without assistance and help; I can't do the things that life was given me for to do; I am this invalid; I am this nervous wreck; I cannot enjoy life.' 'Here I am a young woman 30-odd years of age; I can't walk, I can't engage in games, I can't do anything that makes life worth living. What for? Why has this been brought upon me? What is all the reason for it?'" (R. 428.)

"And I ask you, as men good and true, who understand what life means, who understand what health means, above all other attributes of human beings, to

*Cf. *Higgins* v. *Stang*, (Wis.) 218 N. W. 832; *Stone* v. *Sinclair R. Co.*, 218 Mich. 53, 209 N. W. 118.

give to this woman every single penny that is asked. We ought to have asked for $50,000 instead of 25. I believe that it is a gross injustice for any juror to say, 'Oh, well, it wasn't somebody killed or a leg cut off.' I would rather have both of them cut off than to be suffering all my life with the tortures and the damnable affliction of life as she is, and the consciousness ever present, morning, noon and night, of this inability to do the ordinary things of life.

Is it any wonder that when that young woman took this stand in the very beginning of this trial and her mind was again brought to remember it that she burst into tears and sobbed?* Is it any wonder that that is true?'' (R. 428, 429.)

These arguments, except as otherwise indicated, were made without objection, no assignments of error were made on the basis thereof and the question as to their propriety has not been brought to this Court by the defendant. We submit, however, that it is a proper matter to be considered in determining the prejudicial effect of the arguments to which objection was taken and it is given here for that purpose. As shown above, Courts have condemned appeals of this kind.

With this background of a case in which negligence and liability is predicated solely on conflicting circumstantial evidence; where the natural prejudice against railroad corporations was enhanced by the argument to the jury; where there was an inherent sympathy for the injured person; where twenty-one witnesses testified in regard to the nature of the injuries which plaintiff had sustained; where the plaintiff burst into tears and sobbed while on the witness stand; where her injuries and their possible effect were set before the jury by counsel in their argument with all the pathos and forensic skill at the command of eloquent advocates; we come to the consideration of the arguments to which objection was made.

---

*Cf. *Gold Mines Co.* v. *Bird*, (Ariz.), 260 Pac. 191; *Stutz* v. *Milligan*, (Mo. App.), 223 S. W. 128.

The opening argument for the plaintiffs contained the following:

> "But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis." (R. 412.)
>
> "Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe she has the syphilis." (R. 413.)
>
> "You can see how she walks. She will be a misery to herself; every time she takes a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowing what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most—worst disease that is known in human history, a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one, scintilla of evidence in this case to justify it." (R. 415.)

This argument was followed by a temperate argument for the defendant in which counsel denied that he had charged that this woman suffered from syphilis. He said:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never have said that she did have." (R. 420.)

He thereupon discussed the evidence of plaintiff's witnesses showing that one doctor had a Wasserman test made and gave her iodide of potassium and that that evidence suggested to him that the doctor had made "a wrong diag-

nosis of the case and had been giving this poor woman the wrong treatment." (R. 420.) He discussed the testimony of another doctor whose testimony showed that he had given her salvarsan and said: "In other words, gentlemen, he too had made a wrong diagnosis." (R. 421.) He continued: "What did it prove, gentlemen? That she had had any specific trouble? She would have responded to that treatment. But no, she didn't have it" (R. 421) and discussed the possible effect of the treatment on one who did not have the disease.

It almost appears from the record that counsel for the plaintiffs detected that this open and straightforward denial of the charge had some effect on the jury for in their closing argument, after having complimented the Court and jury, counsel apparently desired to overcome defendant's counsel's denial of the charge by exculpating him personally and placing the entire charge on this "eastern railroad." He said:

> "I cannot but feel a sense of sympathy for my good friend, Mr. Marley. I say that in all sincerity and kindness, because I know him and I know the obstacles that confront him as local counsel for an eastern railroad, the defense in a case of which is prepared by a claim department and handed on to him to try. It is especially hard for him because he knows those two young women and, as he said, has known them for years, and knows they are good people. It is unfortunate that in his representation of this railroad he is required to follow the dictates of some claim department." (R. 424.)

Thereafter follow these statements:

> "Now I want to get some more things to you. You note that Mr. Chilcott said in his opening statement: 'I only know from rumor what the defense in this case may be, but we will be able to meet it'; and just the moment that counsel for the defendant began to interrogate these witnesses with reference to the condition of the blood I made up my mind I would meet it right there. They never for one minute had an idea that we

would put Dr. Geraughty on the stand, so that they couldn't come before this jury and say, 'Why didn't you bring that man?' You mean to tell me when a man who knows all about arachnoids and pia mater and dura mater and all about those things, that he hadn't prepared this defense and worked it out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—" (R. 426.)

To make the arguments which plaintiffs' counsel made to the jury in these cases and especially when made without any evidence to support them can hardly be said to contribute to a dispassionate view of the evidence by the jury but on the contrary the language used was calculated and presumably intended to dethrone the reason and equilibrium of the jury and to disturb that calm deliberation which it is the duty of the jury to bestow. The statements are in themselves prejudicial and their effect was, no doubt, increased by having them spoken in a spirit of indignation and vindictiveness under the inciting circumstances surrounding an important trial. As the Supreme Court of Texas said in a case which was reversed because plaintiff's counsel in his argument to the jury stated that a physical examination of the wife of plaintiff procured on an order of court was an outrage, etc.: "The fact that this oratorical display of counsel approaches the eloquent simply increases the probability

of undue influence upon the jury, and consequent injury to the defendant." (*Gulf, C. & S. F. Ry. Co.* v. *Butcher*, 18 S. W. 583, 584.)

It is significant that neither in this court, in their brief in opposition to the granting of writs of certiorari nor in their brief in the Circuit Court of Appeals, did counsel contend that the argument in question was not of a character calculated to arouse passion and prejudice. The natural effect of the argument would be to lead the jury to disregard liability for the injuries which were sued for and instead of bringing in compensatory damages for such injuries, if they found the defendant liable, these statements would lead them to disregard liability and compensatory damages entirely and to bring in punitive damages against the defendant for having been guilty of the conduct with which it was so unjustly charged. As authority for this statement we need go no further than the brief filed by counsel for plaintiffs in this court. They say:

> "Let us assume as a fact that plaintiff did not have syphilis at all, and that defendant had no evidence whatever to prove that she did have syphilis; then the attempt of defendant's counsel to prove she had syphilis was contemptible; it was a terrible thing to do; it was an attempt to put a stigma upon a pure and innocent woman; an attempt that any lawyer was in duty bound as an advocate and as a man to sternly denounce. * * * A woman is not considered 'decent' who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious, venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law." (Respondent's brief in opposition to issuance of writs of certiorari, page 42.)

If the jury in this case considered the defendant guilty of such conduct—and in view of the rulings of the Court and

their natural unfamiliarity with the legal intricacies of a trial, the jury would have every reason to believe the charge true —they, according to counsel, would be in duty bound as men "to sternly denounce" such conduct. It would deserve their "condemnation" and, as a lawyer who would fail to denounce it would be "unworthy to practice law," so it follows that jurors who failed to denounce it would not have properly performed their duty. The jury had only one way of denouncing this conduct and that was to find the defendant guilty and assess as heavy damages as possible. This they did, bringing in verdicts for the full amount sued for in each case. But verdicts thus obtained are not the result of a fair and impartial trial.

In *Monroe* v. *Chicago & A. R. Co.*, 297 Mo. 633, 249 S. W. 644, the Supreme Court of Missouri quoted the following with approval from *Beck* v. *Railroad*, 129 Mo. App. 7, 24, 108 S. W. 132, 138:

> "Trials before juries ought to be conducted with dignity and in such manner as to bring about a verdict based solely on the law and the facts. Hence reckless assertions unwarranted by the proof and intended to arouse hatred or prejudice against a litigant or the witnesses are condemned as tending to cause a miscarriage of justice."

In *Union Pacific R. Co.* v. *Field*, 137 Fed. 14, 15, Judge Sanborn said:

> "A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client."

In *Waldron* v. *Waldron*, 156 U. S. 361, 380, 383, this Court, in reversing a judgment because of improper argument, said:

> "Indeed, the fact is that the counsel after referring the jury to the evidence which was not in the record stated

to them, in effect, that it established the fact, or authorized the fair inference that the decree of divorce had been rendered on the ground of adultery with Mrs. Alexander, and therefore conclusively established the right of the plaintiff to recover in the present case. It is unnecessary to say that all this is ground for reversal, unless its legal effect be in some way overcome. It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and *it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is,* when duly excepted to, *also ground therefor.* (Citing authorities) * * *

Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. (Citing authorities) There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court." (Italics ours.)

This case suggests a discussion of the effect of the rulings and instructions of the trial Judge on the argument in question. When the first objection was made the Court said:

> "The objection is overruled, in view of the examination of witnesses and of the testimony in the case." (R. 412.)

Counsel for plaintiffs having thus secured permission of the Court for this line of argument proceeded as above quoted. After another objection was made it was agreed by the Court and defendant's counsel that the objection would continue to this line of argument (R. 413), but when this subject was again argued by counsel making the closing argument for

plaintiffs, this ruling was made after objection by the defendant:

> "The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn." (R. 427.)

Instead of guarding "the jury with zealous care against all illegal, improper or unfair arguments or suggestions" (*Union Pacific R. Co.* v. *Field*, 137 Fed. 14) as is of "gravest importance," the argument in question was permitted to go to the jury with the Court's sanction, its effect being thereby greatly enhanced. A few brief quotations from the cases will demonstrate this.

In *Hall* v. *United States*, 150 U. S. 76, 81, Mr. Justice Gray, said:

> "The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, *gave the jury to understand that they might properly and lawfully be influenced by it;* and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. *Wilson* v. *United States*, 149 U. S. 60, 67, 68." (Italics ours.)

In *Kirkpatrick* v. *Wells*, 6 S. W. (2d) 591, the Supreme Court of Missouri, in reversing a judgment, said:

> "The court, by overruling the objection, approved the argument. It was made with the sanction of the court and was prejudicial."

In *London* v. *Bay State St. Ry. Co.*, 231 Mass. 480, 121 N. E. 394, 395, the Court said the following:

> "The argument as a whole called for rigorous and emphatic action on the part of the judge. The burden was upon him to make certain that the jury would disregard this appeal to them to violate their duty. The action taken by the presiding judge fell short of this. What the judge said was:

'It is sufficient to say, perhaps, as to both of those that neither statement has any bearing on any issue that you are trying.'

That is not an instruction that the jury should disregard this argument. Nor is it an instruction equally favorable to the defendant."

In *Illinois Power & Light Corp.* v. *Lyon*, 311 Ill. 123, 142 N. E. 456, the Court said:

"When objections were made to such unfair and improper arguments, the court had a duty to perform, and the mere perfunctory statement on each occasion that counsel should confine himself to the evidence was not a ruling on the objection made or in response to it. It was not a discharge of the duty of the court as a factor in the administration of justice and nothing more than friendly advice to the attorney to be good. The attorneys were not talking about the evidence, but were attempting to create prejudice, and a judgment founded on a verdict tainted with such an argument cannot be permitted to stand."

It is clear that counsel's argument went to the jury with the sanction of the trial Court. That such sanction enhanced the prejudicial effect of the argument is equally clear. Thus in *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, the Court said:

"The language of the prosecuting officer, thus indorsed by the highest authority known to the jury, must have gone home to their minds with powerful and convincing effect, while the counsel for the defendant was left in the attitude of a wrongdoer trying to disturb the proceedings of the court."

And in *Haake* v. *G. H. Dulle Milling Co.*, 168 Mo. App. 177, 153 S. W. 74, 75, the Court said:

"The only purpose the speaker had, or could have had, in making such an argument was to arouse the sympathy and inflame the passions of the jury and coin those emotions into dollars. The rulings of the court, on the whole, merely afforded an opportunity to the

> speaker to emphasize and aggravate the error. He came out with flying colors before the jury when he should have been most sternly reprimanded. Due allowance must be made for fervor in advocacy; but it is the duty of the court to keep impassioned oratory within the limits of the record, and not to allow a party to be injured in his rights by his adversary's extrinsic and passionate eloquence."

Other than the statements that the jury were the sole judges of the facts (R. 429) and that they must depend entirely upon their own recollection of what the testimony was and not upon the recollection of any other person, Court or counsel (R. 437), there was nothing in the charge to the jury which would tend to offset the prejudicial arguments of plaintiff's counsel. These statements, of course, could not offset the prejudice induced by counsel's argument. It is fair to assume that the forceful and repeated statements of counsel, sanctioned as they were by the Court, had more influence upon the minds of the jury than their recollection of what the evidence really was.

In *Cherry Creek National Bank* v. *Fidelity Insurance Co.*, 207 App. Div. 787, 202 N. Y. S. 611, which was a suit on a burglary policy a judgment for the plaintiff was reversed because of prejudicial argument, although the Court held that the verdict was not contrary to the evidence. Counsel for plaintiff argued to the jury that another insurance company had paid the amount due from it and also said the following:

> "They started out very bravely, with shoulders back, heads in the air, and they were going to show you about those vault doors; and what they had in mind was that they were going to try and establish that the vault doors were not locked, but were burned when they were opened, and they originally meant that some of these girls, Miss Lake or Smith or some one else robbed that bank—"
>
> "I hope and believe that this jury is going to place the stamp of its condemnation on the kind of practices

which have obtained in this case. I think you are going to put the stamp of your condemnation upon the defense of lawsuits of this character by outside people whose business it is not. What are we going to think when we get denied a little insurance which is due us? Have we got to fight to get it? Have we got to fight the bank accounts of all these mighty corporations?"

The Court there said:

"These quoted passages do not embody all of the occurrences of this kind upon the trial, but they are fair samples of the others, and illustrate sufficiently the conduct of counsel. In our opinion the learned trial court chose apt and vigorous words to characterize the conduct. His admonitions to counsel were sound, and should have been regarded. His instructions to the jury were well and properly given. He did everything to protect the interests of the litigants, short of declaring a mistrial. He expressed his impression that he should also have done that. We agree with him that, in view of the serious character of the repeated breaches of the rules, the defendant's motion that a mistrial be declared ought to have been granted. *Zukas* v. *Lehigh Valley Coal Co.*, 187 App. Div. 315, 319, 175 N. Y. Supp. 408.

The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement of the matters at issue between the litigants, or appealing to prejudice or passion. The rule confining counsel to legitimate argument is not based on etiquette, but on justice. Its violation is not merely an overstepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them to do this, not tend to lead them astray. *Cattano* v. *Metropolitan St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563. The law is so insistent that misleading prejudicial matter shall not be allowed to enter jurors' minds that under certain circumstances the asking of an incompetent question for an ulterior purpose, even though the question be not answered, will justify the setting aside of a verdict. *Cos-*

selmon v. *Dunfee*, 172 N. Y. 507, 65 N. E. 494. Breaches of the rule limiting counsel to a discussion of the evidence have become all too frequent of late. It is time that the bar should realize that, when counsel in a close case resort to such practices to win a verdict, they imperil the very verdict which they thus seek. *Graham* v. *Graham*, 142 App. Div. 131, 126 N. Y. Supp. 941; *National Supply Co.* v. *Jebb*, 142 App. Div. 256, 127 N. Y. Supp. 52; *Harris* v. *Eakins*, 201 App. Div. 257, 194 N. Y. Supp. 187; *Loughlin* v. *Brassil*, 187 N. Y. 128, 79 N. E. 854; *Simpson* v. *Foundation Co.*, 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321; *Dimon* v. *New York Cent. & H. R. R. Co.*, 173 N. Y. 356, 66 N. E. 1; *Cox* v. *Continental Insurance Co.*, 119 App. Div. 682, 104 N. Y. Supp. 421; *Williams* v *Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048."

In *Gibbons* v. *Pennsylvania R. Co.*, 291 Pa. 141, 139 Atl. 743, the Court said:

"It is admitted that counsel for plaintiff stated in argument as follows:

'Just look at that man. Does he look like a crook? Does he look like a liar, and does he look like he was a man who was trying to rob some railroad?'

This comment was manifestly improper. The question for the jury to determine was not whether Gibbons was a crook, a perjurer, or a robber, but whether the facts as testified to showed negligence on part of the railroad, free from proof of contributory negligence of plaintiff. *The natural tendency* of such language *was to put in the minds of the jurors the impression that, if they did not decide in favor of the claimant, their determination would in effect be a declaration that he was of the criminal class suggested.*

The evident purpose was to prejudice the triers of fact, and it deserved the immediate condemnation of the trial judge. (Citing and quoting from authorities) * * *

What was said in *Mittleman* v. *Bartikowsky*, *supra*, 283 Pa. 485, page 488 (129 A. 566), may now be appropriately repeated:

'It should, furthermore, be kept in mind that once having made improper remarks, it will not always avail

the offending counsel to say that he was justified because of the "atmosphere of the trial" or because of the manner in which his opponent conducted his case.'

The effect of the argument complained of was to give a wrong impression to the jury of the question to be decided, or at least this may have been the result. As counsel made no attempt to withdraw his improper statement, when objection was made, and the trial judge failed to caution the jury at the time, or later in its charge, against permitting the same to have any influence or in any way prejudice it in reaching a verdict, the case should be retried. The failure to thus admonish the jury, when attention was specifically drawn to the matter, might well have been considered an approval of the argument submitted." (Italics ours.)

We conclude with the following from *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, which, although said in a criminal case, is applicable here:

"Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well-established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and the precedent may at some time aid in depriving an innocent man of his liberty or his life. The judgment should be reversed, and a new trial ordered."

Respectfully submitted,

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

APPENDIX.

I.

There was no justification for the charge that the defense was that Myrtle Johnson had the syphilis.

The pleadings contain no mention of this subject. No affirmative defense of this nature was made in the defendant's answers. General denials were filed (R. 16-17).

In the opening statement for the defendant, it is stated that prior to the trip Myrtle Johnson had "applied herself assiduously to her work" which together with "the responsibilities of her business" had brought her to "a state of nervous irritation" and that she "was advised that she must rest a while; if not she would have a nervous breakdown," (R. 93) and concludes that the defendant believes that "the evidence will show that this condition is due entirely to her nervous breakdown and not to any blow that was received on the head at that time" (R. 95). The opening statement furnished no basis for the charge that Myrtle Johnson had the syphilis nor is there any "insinuation" that she was suffering from this disease.

Only one medical witness testified for the defendant—Dr. I. D. Siminson. He examined Myrtle Johnson when she arrived at Chicago and before she departed for Kansas City. He found no lump on her head and no broken skin (R. 359). Myrtle Johnson told him that prior to that time she had had an attack of double vision (R. 359). She complained of numbness in her hands and legs (R. 360). This doctor gave no treatment because he felt that no treatment he could give

would benefit her ailment, it appearing to him to be of a hysterical nature. (R. 360.) There is no charge here of syphilis or any insinuation that Myrtle Johnson had the disease. None of defendant's other witnesses testified to any facts or circumstances from which it could be inferred that the defendant was charging that Myrtle Johnson had syphilis.

In his argument to the jury defendant's attorney said:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never have said that she did have. But let me tell you: I did have a right to show to the jury that her permanent condition was not due to the conditions as existed until she had been treated by Dr. Geraughty under a mistaken diagnosis of the case by himself." (R. 420.)*

He amplified this statement and pointed out that the hospital sheet, made by Doctor Sanders and introduced by the plantiffs, showed that a Wassermann test was made and that they commenced to give her iodide of potassium and that "that suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment." (R. 420.) He said that Myrtle Johnson went to Doctor Geraughty, that he "undertook to give her this treatment, which it is admitted is the same as salvarsan," and that "he too had made a wrong diagnosis" and that she begged him to withhold the treatment because she was suffering so much then. "What did it prove, gentlemen? That she had had any specific trouble? She would have responded to that treatment. But no, she didn't have it." (R. 421.) He thereupon argued that the giving of mercury and arsenic to one not suffering from the disease might

*Doctor Geraughty was the doctor who administered arsenic, iodides and mercury. (R. 120.) Prior to this statement defendant's attorney had said "Dr. Woody especially was the one that saw her before she ever had this mistaken treatment by Dr. Geraughty." (R. 417.)

have had some effect on her present condition (R. 421). This is but following out the opening argument for plaintiffs where it was said that Myrtle Johnson "made a mistake in choosing a doctor who gave her a treatment which resulted in arsenical poisoning," and that "she suffered the agonies of the damned in St. Margaret's hospital, where she had a rash from her head to her heels and where she lost her hair." (R. 416.) Instead of charging that she suffered from syphilis defendant's attorney argued the contrary. His argument does not substantiate the charge that the defense was syphilis.

But counsel assert that it was beyond the defendant's power to call a physician to testify as to her condition and that "the only thing left for it to do was to attempt to prove 'syphilis' by cross-examination of plaintiffs' lay witnesses and physicians" and some citations of the record are given to show this was done. (Respondents' brief in opposition to issuance of writs 15.) Plaintiffs' evidence will be briefly examined for the purpose of disproving this assertion. It is said the issue was first injected into the case by the cross examination of Imogene Johnson. Defendant's attorney asked her if Myrtle Johnson had any eruption of the skin about the time she was going to see Dr. Geraughty. The witness answered that she saw her in this condition after Myrtle Johnson had been to Dr. Geraughty. She described this condition of the skin as a rash which covered her body. (R. 155.) She was asked if it looked like a pimple that would not come to a head and answered that it looked more like a rash. (R. 156.) She was also asked if Myrtle Johnson, while at St. Margaret's, had ever told her whether they gave her hypodermic injections or whether they gave her medicines internally. (R. 157.) Up until this time in the trial there had been no mention of potassium iodide, syphilis or of "specific trouble" and no evidence that eruptions of the skin might be a symptom of syphilis or that

hypodermic injections or medicines internally were the ordinary treatment for syphilis. The evidence shows that this rash was not due to syphilis but to arsenical poisoning. (R. 416.) In the absence of evidence as to the symptoms and treatment of syphilis it can hardly be said that the defendant, by this cross examination was charging that Myrtle Johnson suffered from syphilis. It is well known that rash and eruptions of the skin result from many ailments in no way related to syphilis.* It is likewise a matter of common knowledge that "hypodermic injections and medicines internally" are given for many diseases and sicknesses and that the administration of such remedies is not necessarily an indication that the patient is syphilitic.

The first time the terms "potassium iodide," "blood tests" or "Wassermann" appeared in the record was when the plaintiffs' witness, Dr. Sanders, was examined by plaintiffs' attorney and when they offered in evidence Plaintiffs' Exhibits 4-A to 4-R. (R. 162.) Exhibit 4-K, (opposite R. 165) and Exhibits 4-L, 4-M, 4-N, 4-O, 4-P, 4-Q (between R. 196 and 197) show that Myrtle Johnson was given potassium iodide (R. 196) and Plaintiffs' Exhibit 4-C (R. 182) relates to a Wassermann test. These exhibits were not requested by the defendant. On the contrary objection was made to some of them. (R. 163.) Concerning Exhibit 4-C, the following appears in the record:

> "Mr. Marley (defendant's attorney): Q. Now this 4-C?
>
> Dr. Sanders: A. That was made by our pathologist, Dr. Richman.
>
> Q. You told him to make one out and report to you?
>
> A. I simply told him 'take her blood and make a Wassermann,' and that is the report there." (R. 163.)

---

*Plaintiffs' witness, Doctor Sanders, who testified that he found some acne pimples on this woman, said these were the kind anyone was liable to have and that he found nothing indicating that Myrtle Johnson had syphilis (R. 190, 191). Plaintiffs' witness Geraughty testified that some people will have a rash from eating strawberries. (R. 325.)

While this exhibit relates to a Wassermann test, it is significant to note that defendant's attorney so framed his question, that the jury would not know that to be a fact. Plaintiff's witness however, supplied the information from plaintiff's exhibit when the natural answer to the question would have been a mere "yes." Counsel say iodide of potassium is "a well recognized treatment for syphilis." This is not the same as saying that it is a matter of common knowledge that the drug is used for that purpose.* However if such be the general understsanding, the plaintiffs cannot place the blame upon the defendant for introducing it into the trial because the giving of this treatment to Myrtle Johnson was brought out by the exhibits introduced by the plaintiffs.

The next quotation offered to support their charge is a part of an objection made by defendant's attorney to a question calling for an opinion from Dr. Sanders as to whether any further improvement would take place. (R. 173.) The question and the objection relate to a hypothetical question theretofore asked this same witness. (R. 165-167.) In his objection defendant's attorney contended that the witness' question should be based on certain additional facts not embodied in the hypothetical question but shown by the exhibits introduced by the plaintiffs, namely, blood tests and the treatment, iodide of potassium. (R. 173.) The objection was overruled, but it certainly cannot be said to be frivolous, nor can it be said that because defendant's attorney recited a portion of the medical history of the case, theretofore introduced in evidence by the plaintiffs, that the "defense was syphilis." It may be doubtful whether the mere mention, without explanation, of the terms "blood tests"** and "iodide of potassium" convey to the lay mind any inference that these things relate to syphilis, but if such an

*Doctor Sanders testified that it was for the absorption of any brain edema or possible clot or exudate, and that these might have come from this blow. R. 178. Cf. Doctor Connor R. 229 and Doctor Geraughty R. 324, 325.

**Exhibit 4C, R. 182, mention many blood tests, besides the Wassermann.

inference be conveyed the plaintiffs have no one to blame but themselves. They introduced the evidence relating thereto.

It is next charged that the defendant attempted to show syphilis because of the following:

> "Mr. Marley: Q. Now, I notice here you gave her iodide of potassium. Dr. Sanders: A. I did, yes, sir. Q. What is that for? A. That is for the absorption of any brain edema or any possible clot or exudate that may be there. Q. Well, would those all come from this blow, you think? A. It could. Q. But did it? A. I think it did; yes, sir. Q. That is your judgment? A. That is the theory upon which I treated the case; yes, sir. Q. I know, but couldn't there be another theory in that case? A. Yes, sir. I suppose there could be hundreds of theories; yes, sir. Q. That is just your opinion? A. That is just my opinion; yes, sir." (R. 178.)

Plaintiffs having introduced evidence that iodide of potassium was administered to Myrtle Johnson, the defendant was not guilty of improper conduct nor was it charging her with having syphilis because its attorney asked the doctor why the treatment was given. If the question can be said to contain a hidden meaning, it is defendant's attorney's doubt as to whether the possible clot or exudate came from a blow on the head and not as to whether or not potassium of iodide was a proper remedy for the purpose mentioned. Here again there is nothing conveying to the lay mind that the defense was syphilis. A few further questions, not relating to this subject were asked by defendant's attorney, when plaintiffs' attorney on re-direct examination asked this question:

> "Q. Just one question, Doctor. Among the records you brought here was a record with reference to blood test. I will ask you if in the ordinary routine of your hospital in cases anywhere similar to this you cause blood tests to be made?" (R. 179.)

Defendant's attorney on re-cross examination interrogated the witness on various blood tests and the part of the body from which fluid may be taken for Wassermann tests—the term "Wassermann test" having been introduced voluntarily by plaintiffs' witness—without having made any specific mention of syphilis. (R. 180.) When this examination was concluded, the following took place:

> "Mr. Wickersham (Plaintiffs' attorney): I just want to ask you one question on that. You take the blood tests, the Wassermann tests, such as you have described, in all cases where you take them at all, from the arm? A. As far as I am personally concerned, yes. Q. You are perfectly satisfied that that is a reliable test? A. For certain things; yes, sir. Mr. Wickersham: Yes. That is all.
>
> Mr. Marley: What are those certain things, Doctor? A. The test whether there is syphilis or not in an active form. Q. Whether or not there is syphilis in an active form; but supposing there is not in an active form, a luetic condition that is not active, then what? A. Well, when you have a luetic condition and there is still symptoms that are not accounted for by other things you go further; you go into the spinal column. Q. That is it exactly, and that is the one that goes in and finds out whether it is in the system or not, doesn't it? A. Not necessarily; no more than the blood test. Q. But you say the blood test is in the active form? A. Sometimes not even in the active form. I have taken blood tests that were positive and the spinal column tests that are negative. Mr. Marley: That is all." (R. 181.)

Here, for the first time, was the word "syphilis" introduced in the trial and we submit that any responsibility for its introduction must be borne by the plaintiffs and not by the defendant. But there is no charge here that Myrtle Johnson had this disease.

Dr. Richman was the next witness, and it is in connection with his examination that plaintiffs' counsel cite further arguments for their charge that the defense was syphilis. On direct examination of this witness plaintiffs' attorney elicited

the information that the blood test recorded on Plaintiffs' Exhibit 4-C was made by this doctor and that the result of the test was negative. He then asked this question and received the following answer:

> "Now, what does that mean, Doctor? A. It means that as far as the Wassermann test for syphilis that it showed negative. It showed that there was—well, what we call as a positive indicates syphilis and as a negative is not indicating syphilis. Q. Does that mean she didn't have it, according to your opinion, or not? A. No. —." (R. 182.)

The cross examination of this witness merely continued the subject theretofore introduced by plaintiffs' attorney and relates to the various Wassermann tests which are made. The examination is entirely impersonal and contains no charge that Myrtle Johnson had syphilis.

The plaintiffs next called Dr. Bahr, who testified on direct examination that he made a Wassermann test of Mrs. Johnson. Plaintiffs' attorney said:

> "Now, then, you tell us; what did you find?"

to which the witness replied:

> "I found a negative—a negative finding is such where a certain condition do not exist. The specific examination is made of the blood for—the request was for syphilis. We call it a Wassermann test through the fact that the first man who modified—." (R. 187.)

On cross examination he testified that he made the Kolman, the Wasserman-Noguchi modification, and Hecht-Weinberg tests. There is nothing in his cross examination to the effect that Myrtle Johnson had the syphilis or that the defendant was seeking to prove that fact.

Dr. Sanders re-called by the plaintiffs was examined at some length by plaintiffs' attorney as to syphilis and the various symptoms of this disease. (R. 189-191.) After naming each symptom he was asked by plaintiffs' attorney

whether Mrs. Johnson had such symptom. (R. 189-191.) Here was testimony directly associating the term syphilis with Myrtle Johnson—and it showed that she had none of the symptoms—but this evidence was introduced by the plaintiffs. Defendant's attorney asked only one question,—"Now, what you call paraplegia is paralysis from the hips down, isn't it." (R. 193.) It is argued, however, that because defendant's attorney objected to a question in regard to locomotor ataxia that he thereby "claimed that Mrs. Johnson had syphilis." The record on this is as follows:

> "Mr. Wickersham: I want to ask you if it differentiates this woman's case from anything like locomotor ataxia, this movement of the leg as she walks. Tell us about that, please. A. Locomotor ataxia is a disease caused as one of the late manifestations of syphilis, and is an entirely different walk from what this woman has. Q. In what way, so we understand it? A. Well, in this way: In locomotor ataxia the nerve endings in the palm of the hand and in the sole of the foot die. The result of it is they haven't the sense of touch that they have otherwise, and when they walk the locomotor ataxia swings his leg like that.
>
> Mr. Marley: If the court please, I don't believe there is a question of locomotor ataxia in this case at all, so far as the evidence is concerned so far, and I object to going into it.
>
> Mr. Wickersham: If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question.
>
> Mr. Marley: I am saying now there was nothing said about locomotor ataxia, and he is going into something that isn't within the range of the testimony as developed at this time; and we object to it as incompetent; too remote.
>
> The Court: Objection sustained.
>
> Mr. Wickersham: The idea was, your honor, that this evidence about the blood test—I wanted to go into it if there is any question about it. That is all. You may examine." (R. 192.)

It needs no argument to show that there is no claim here that Mrs. Johnson had the syphilis.

Certain X-ray pictures were offered in evidence and defendant's attorney made the following objection thereto:

> "Now, if your Honor please, we object to them being introduced in evidence, because they are taken too remotely from the time of the accident. The evidence has developed that Myrtle Johnson had several different doctors and several different kinds of treatment. Now, unless they show that nothing intervened to change the condition of her brain, or by virtue of the treatments given to her by the various doctors, that would be incompetent, because it would embody any mistakes they made in the diagnosis of her case, and we object as incompetent for any reason." (R. 205.)

It is argued that by making this objection defendant's attorney was "still hammering at 'syphilis' before the jury." One of plaintiffs' attorneys in his argument to jury stated that her doctor made a mistake which resulted in arsenical poisoning and that because thereof Myrtle Johnson suffered "the agonies of the damned in St. Margaret's hospital, where she had a rash from her head to her heals, where she lost all her hair" as the result of the mistake of the doctor. (R. 416.) For defendant's attorney to suggest that such treatment might have changed the condition of the brain or might call for a showing that such was not a fact was not improper and was not "still hammering at 'syphilis' before the jury."

Plaintiffs' next citation from the record is the cross examination of Myrtle Johnson. She testified that Dr. Geraughty injected "some kind of serum" into the muscle of her arm. The following then took place:

> "Mr. Marley: And did he tell you what it was? A. No, he just told me that he knew he could do me a lot of good. Q. Didn't he call it salvarsan? A. No. Q. He didn't? A. No. Q. Didn't he tell you that it was an arsenical treatment? A. No." (R. 282.)

Thereafter she testified that while this treatment was being given, her face, arms and hands "broke out and swelled up"; that her eyes were almost closed and she was in "a

terrible fix" (R. 283) and that Dr. Miller (R. 283) and Dr. Krall (R. 284) diagnosed it as arsenical poisoning. It is said that defendant here tried to get Mrs. Johnson to admit that the serum was "salvarsan." We submit the examination shows no such effort and shows no attempt to prove that she had syphilis. If anything it shows the contrary.

Mrs. Johnson was asked if Dr. Krall told her that the medicine which he gave her, after she consulted him about the arsenical poisoning, contained bismuth. (R. 285.) The significance of this question so far as the charge of syphilis is concerned, is not pointed out by the plaintiffs. It suggests nothing to the lay mind. She was asked if Dr. Hines or Dr. Miller gave her any hypodermic injections (R. 286) and that question is cited to show that the defense was syphilis. The giving of hypodermic injections is not confined to those suffering this disease.

The cross examination of Dr. Geraughty furnishes the next ground upon which plaintiffs base their charge that the defense was syphilis. In the direct examination of this witness, plaintiffs' attorney asked the witness if he had obtained any history from Myrtle Johnson of any blood tests (R. 317) and if he was advised whether or not she had had a Wassermann test. (R. 317, 319.) This witness on direct examination testified that he examined her throat, skin, reflexes and glands. (R. 319.)* He was asked what a Wassermann test is used for and answered that the purpose was to discover syphilis in the blood. (R. 320.) He said that he wanted to be real sure that she did not have syphilis and therefore subjected this patient to a medical test of arsenic, iodides and mercury. (R. 320.) He explained this test to the jury and stated that it showed no evidence of syphilis. (R. 321.) He was asked if he discovered any evidence of neurosyphilis and to define that term. (R. 321.) He was

*Doctor Sanders had testified when examined by the plaintiffs' attorneys that symptoms of syphilis might be found in these. (R. 190, 191.)

asked about the Argyll Robertson pupil, skin symptoms, throat symptoms, bone symptoms, knee reflexes, patella reflexes, enlarged glands and the arsenic, mercury, and iodide treatments (R. 322); and was asked to explain each of these in relation to syphilis and whether he found any of such symptoms in this patient. (R. 322-325.) He was asked to state whether she suffered from traumatic hemiplegia or syphilis. (R. 324.) He was asked about the skull, its membranes—diploe, dura mater and pia mater, and the effect of a blow upon the left side of the head—whether there might not be a lesion of the tissue without a fracture of the bones. (R. 327.) When an objection to some of this testimony was made by defendant's attorney and overruled by the Court, Plaintiffs' attorney said: "But this is enlightening to the jury." (R. 328.) On cross examination he was asked about some of the matters concerning which he had testified on direct examination, such as the treatment which he had given Mrs. Johnson and its purpose (R. 329-330) blood and serum tests (R. 331), lesions of the brain tissues and the membranes in the skull (R. 332). In their argument counsel state that the defendant by this cross examination was claiming that Mrs. Johnson had syphilis in the secondary stage. The cross examination was but a continuation of the direct examination, except that no effort was made to associate the testimony with Mrs. Johnson's condition and no claim or contention was made that Mrs. Johnson suffered from syphilis in any stage.

Dr. Hines testifying for the plaintiffs, on direct examination stated that he treated her for arsenical poisoning and was asked if he saw any evidence of syphilis (R. 337). On cross examination he was asked whether she had told him that she had had a Wassermann test and that it showed positive (R. 338). Plaintiffs' witness, Dr. Miller, was asked on direct examination if he saw any evidence of syphilis (R. 339) and on cross examination was asked whether he made any examination as to her blood condition (R. 339). Plaintiffs'

witness, Dr. Krall, was asked on direct examination whether he made any blood tests, whether he observed any evidence of syphilis or neurosyphilis (R. 354) and on cross examination was asked whether he asked her if a Wassermann test had been taken and if she told him it was positive (R. 356). He was also asked what treatment he gave her and whether or not he gave her bismuth (R. 357). This cross examination of these doctors is said to be "an effort to prove syphilis" and "directing the jury's attention to syphilis." There is no evidence of any such effort and since the plaintiffs in each instance introduced the subject on direct examination, they have no grounds upon which to base a claim that the jury's attention was directed to this subject by the defendant.

We submit therefore that there is no "defense of syphilis" in defendant's pleadings, its opening statement, its evidence or its argument to the jury; that the record shows that the subject was introduced by plaintiffs' attorneys on direct examination of their own witnesses; that defendant's cross examination contains no such defense; and that the Circuit Court of Appeals was right when it said:

> "We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination." (Rec. 472.)

II.

The argument when objected to required a prompt rebuke from the trial Court. Failure to so do was an abuse of discretion.

Cases are cited to the effect that the control of argument is largely within the discretion of the trial Court. These cases, however, do not present facts and circumstances similar to those involved in the instant cases. If control of the objectionable arguments made in these cases was a matter of discretion for the trial Court, the action or inaction of the court was an abuse of such discretionary power requiring interference by this Court. The authorities heretofore cited, support this statement. In *Jackman* v. *St. Louis & H. Ry. Co.*, 200 Mo. App. 368, 206 S. W. 244, 246, the court said:

> "It is always improper for counsel to undertake in argument, to influence the action of the jury by asserting, as facts, matters which do not appear in evidence, as our courts have repeatedly held. Statements of this character are particularly objectionable when the obvious purpose thereof is to arouse passion or prejudice in the minds of the jury, or to create a feeling of resentment against or aversion to the opposing party. Much latitude may properly be allowed counsel in stating, in argument, their conclusions or deductions from the evidence; and frequently improprieties in argument, occurring perhaps inadvertently, in the heat of the trial, are not, in any event, of such character as to constitute ground for reversal; and much may be left to the sound discretion of the trial Court in respect to such matters. But where, as here, the effect of such extraneous matter, thus injected into the trial, could only serve to warp the judgment of the jury upon the facts, and make it probable that the scales of justice will be turned by creating an unwarranted feeling of hostility or resentment toward one party litigant, nothing else than prompt and vigorous action on the part of the trial Court, appropriate to the occasion, will suffice to guard against a

miscarriage of justice, if, indeed, this can always be effectual for such purpose. It is unnecessary to collate the many authorities to which we might refer in this connection; but see *Bishop* v. *Hunt*, 24 Mo. App. 373; *Beck* v. *Railroad*, 129 Mo. App. 7, 108 S. W. 132; *Blyston-Spencer* v. *Railroad*, 152 Mo. App. 119, loc. cit. 142, 132 S. W. 1175; *Levels* v. *Railway Co.*, 196 Mo. 606, 94 S. W. 275; *Neff* v. *Cameron*, 213 Mo. 350, 111 S. W. 1139, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606; *Buck* v. *Buck*, 267 Mo. 644, loc. cit. 660, 185 S. W. 208.

The mere admonition to counsel to 'stick to the evidence' did not, in our judgment, suffice as an antidote to the poison thus injected into the case. See *Beck* v. *Railroad, supra; Bishop* v. *Hunt, supra.* In the latter case (24 Mo. App. loc. cit. 377) it is said:

'The only proper remedy in all cases, when objection is made, is a prompt rebuke from the court, which shall be so emphatic as to strongly impress the jury with the unfairness of the procedure, and to deter them from giving the least weight to an argument so hostile to the pure administration of justice. The placid direction in general terms given by the court on this occasion (that counsel "keep to the facts of the case") was anything but a suitable preventive for the mischief to be avoided.' "

III.

The objections and exceptions of the defendant were sufficient to preserve its rights.

It is argued that the defendant did not move to discharge the jury or request any instruction to the jury on this subject. Objections were made to the argument and exceptions preserved. The objections were overruled and no further action by the defendant was necessary. In cases where an objection to improper argument is sustained, the complaining party in order to preserve his rights and be able to contend that the verdict was the result of passion and prejudice induced by such argument, must request the court to rebuke counsel or request an instruction charging the jury to dis-

regard such argument and under some circumstances request the discharge of the jury. In these cases since the objections were overruled, such further action was unnecessary and would have tended to increase the harmful effect of the argument.

In *Wilson* v. *United States*, 149 U. S. 60, where it was held that the exceptions and writ of error properly brought before this Court the improper conduct of counsel, the following appears in the statement of facts:

> "To this language of the District Attorney the counsel for the *defendant excepted*, and called the court's attention to it, and the court said: 'Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the State's statutes, I do not know that it ought to be the subject of comments by counsel.' To which the District Attorney replied as follows: 'I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf.' To which the counsel for the defendant thereupon excepted."

The argument for defendant in error states the following:

> "The counsel for defendant below did not ask the court to give any directions or instructions to the jury in this connection, or to inform them that the omission of the defendant should not 'create any presumption against him.' They 'notified the court' of the exception, and the court said: 'Yes, I suppose the counsel should not comment upon the defendant not taking the stand * * * I do not know that it ought to be the subject of comments of counsel.'"

And Mr. Justice Field said the following:

> "This language of the District Attorney, and this action, or rather want of action, of the court, are set forth in the bill of exceptions, and although exceptions are generally taken to some ruling, or want of ruling, by the court in the progress of the trial in the admission or rejection of evidence or the interpretation of instruments, yet they can be taken to its action or want of

proper action upon any proceeding in the progress of the trial from its commencement to its conclusion, and when properly presented can be considered by the court on writ of error.

The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

In *London* v. *Bay State St. Ry. Co.*, 231 Mass. 480, 121 N. E. 394, 396, the court said:

"The plaintiff's next contention is that the defendant has not saved his rights; that if the defendant's counsel was not satisfied with the subsequent statement made by the judge it was his duty to tell the judge so and to except to his refusal to change what he then said. We are of opinion that this contention is without foundation. The defendant had in terms taken an exception to this argument of plaintiff's counsel. He also asked the judge at that time 'to have the jury instructed to disregard the statement.' *When he had taken an exception to the argument he had reserved his rights unless the judge cured the error which had been committed.* The error in the argument to which the defendant took an exception was not cured by what the judge said. His rights were saved by the exception taken." (Italics ours.)

In *Volkmor* v. *United States*, 6th C. C. A., 13 F. (2d) 594, 595, the court said:

"Admitting that these statements were wholly unjustifiable—as indeed must be done—the government contends that, as defendant failed to ask for exceptions, the error is not available. In the first place, there was no adverse ruling on the objections, and in that situation an exception was a matter of dubious propriety. But, even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and to instruct the jury to disregard the remarks."

In *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, the court said:

> "Moreover, the objections taken were to the general course pursued by the district attorney, and *when the court had sanctioned this, no further objection or exception was necessary.* This method of summing up should have been sternly interrupted by the court of its own motion, so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done." (Italics ours.)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

No. 455.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

EDWARD H. JOHNSON, RESPONDENT.

No. 456.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

MYRTLE J. JOHNSON, RESPONDENT.

BRIEF OF RESPONDENTS IN OPPOSITION TO ISSUANCE OF WRITS OF CERTIORARI.

STATEMENT OF CASE.

These are passenger-carrier *res ipsa loquitur* cases. Plaintiffs had judgments in the trial court; the defendant did not make a motion for a new trial; did not

give the trial court an opportunity to pass upon alleged errors, but sued out writs of error, under which the amount of the verdicts could not be questioned.

The Circuit Court of Appeals for the Eighth Circuit on July 2d, last, affirmed the judgments.

Under Rule 28 of the Circuit Court of Appeals, the defendant had sixty days in which to move for a rehearing. The defendant declined to make such a motion, and thus deprived that court of an opportunity to correct any alleged errors.

STATEMENT OF FACTS.

Myrtle Johnson, thirty-two years of age, weighing 160 pounds (R. 94), strong, athletic, in perfect health (R. 361, 329, 290), was a passenger on one of defendant's trains; she stood in the aisle of a Pullman car, holding onto the curtains and the partition between two berths, bracing herself against the ordinary sway of the car (R. 108, 274, 275, 276, 277, 305); her sister-in-law, Imogene Johnson, was seated on the edge of the berth with her back braced against the arm of the seat and her foot braced in the aisle (R. 142, 144) to protect herself against any ordinary sway or lurch of the car; they had placed a suit case on the berth in order to get out their night clothes (R. 108); then there came "the most extraordinary jerk, jolt, lurch and lunge that I have ever experienced" (R. 112). The sudden lurch swung Myrtle around and tore her grasp from the partition and the curtains and crashed the left side of her head against the upper berth "with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor" (R. 276-7) across the aisle to the head of the opposite berth. Imogene, weighing 160 pounds, and who had braced herself, as aforesaid, was catapulted over the suit case and diagonally across the berth to the rear end with her hand clutching the rear sill; the lunge and lurch of the train was so great as to cause a lesion of Myrtle's brain and her entire right side was permanently paralyzed.

The conductor being notified of the accident and injuries wired ahead to Chicago for a doctor. Myrtle and Immogene were experienced travelers (R. 315, 111) and each testified that "this was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced" (R. 112, 275).

The defendant's counsel in his argument to the jury said:

> "But all of a sudden there was a check of the car and it pitched her forward * * * the tendency is just like the cracking of a whip."

Defendant's counsel after commenting upon the fact that the plaintiff produced twenty-one witnesses to testify to the "condition of this poor woman" (R. 427) said:

> "You don't need those witnesses to tell you her condition, you could tell it by looking at her on the stand."

This statement and the refusal to move for a new trial constitute a frank admission that the verdicts are not excessive.

To meet the strong *prima facie* case of the plaintiff, *the defendant did not produce or account for either the engineer or the fireman of the train, or any passenger on the car or train*, though the defendant had the reservation lists containing names of all Pullman passengers, and the other trainmen, who were produced, were all thoroughly impeached and discredited.

The "**Statement of the Case**" of the defendant is so inadequate and so garbled and leaves out so many of the "attending circumstances" of the accident that we print as Appendix A to this brief the Statement of Facts printed in our brief in the Circuit Court of Appeals.

BRIEF.

WRITS OF CERTIORARI SHOULD NOT BE GRANTED HEREIN FOR THE FOLLOWING REASONS:

1. **These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."**

Layne & Bowler, Corp. petitioners v. *Western Well Works, et al.*, 67 L. Ed. 712.

Federal Trade Commission, petitioner v. *American Tobacco Co.*, 71 L. Ed. 1193.

2. **"The conclusion of the Circuit Court of Appeals depends upon appreciation of circumstances which admit of different interpretations," and this court should "adhere to the usual ruling of non-interference in such cases."**

Federal Trade Commission, petitioner v. *American Tobacco Co.*, 71 L. Ed. 1193.

3. **The jury decided that there was a negligent operation of the train; the Circuit Court of Appeals has held there was sufficient evidence to warrant the verdicts, which decision upon the facts ought to be final.**

This court "will not grant a certiorari to review evidence and discuss specific facts."

United States of America, petitioner v. *James J. Johnston*, 69 L. Ed. 925.

Southern Power Co., petitioner, v. *North Carolina Pub. Service Co., et al.*, 68 L. Ed. 413.

4. **The decision of the Circuit Court of Appeals is not in conflict with any decision of this court.**

a. That this is a plain *res ipsa loquitur* carrier-passenger case in harmony with many decisions in

the Federal Courts, see, in addition to the cases cited in the opinion of the Circuit Court of Appeals, the following:

Hanlon v. *Southern Pac.*, 9 Fed. 2nd. 294.
Needham v. *C. & O. R. Co.*, 244 Fed. 146.
Kansas City Southern Ry. Co. v. *Clinton*, 224 Fed. 896.
R. R. Co. v. *Pollard*, 22 L. Ed. 877, 22 Wall. 341.
Gleeson v. *Virginia Midland R. Co.*, 140 U. S. 443, 35 L. Ed. 458.

b. *The Circuit Court of Appeals did not hold, as claimed by defendant, that the mere happening of the accident without proof of negligence made out a prima facie case.*

The defendant quotes but one sentence from the opinion; the whole opinion must be read to understand the law laid down. The following excerpt from the opinion completely disposes of the defendant's contention:

> "The court told the jury that the railroad company was not an insurer of the safety of its passengers; that the latter are not entitled to recover damages merely by showing they were injured; that the carrier was only liable for negligence in exercising that high degree of care that the law imposes upon it; and that there could be no recovery unless the jury found by a preponderance of the testimony that the injury was caused by an extraordinary and unusual lurching, etc., of the train, and not then, unless the same was caused by the defendant's negligence, and that the burden was upon the plaintiff to prove his case. The correctness of all this was not, for reasons we have stated, affected by the further instruction that if the injury was directly caused by an extraordinary lurching and jerking, the

> plaintiff need not go further and prove what negligence, if any, caused that lurching, the law presuming that an extraordinary occurrence of this kind was due to the fault of the carrier; but that this presumption was rebuttable, and not conclusive. *Mendelson* v. *Davis*, 281 Fed. 18; *Lee Line Steamers* v. *Robinson*, 218 Fed. 559."

5. **The decision of the Circuit Court of Appeals is not in conflict with Norfolk & Western Ry. Co. vs. Birchett, (4. C. C. A.) 252 Fed. 512, as claimed by defendant.**

Mrs. Birchett, alone in a dressing room of a Pullman car on a fast train, fell from a chair and hurt her arm; upon the trial she claimed she was caused to fall by a violent lurch of the car. *She produced no corroborative evidence whatever*, and admitted that at the time she made no complaint about any negligent handling of the train. The defendant by overwhelming proof established that "the train was operated in the customary manner" and that there was "no unusual movement of the car." Concerning the admissions of the plaintiff, the Circuit Court of Appeals said:

> "And the significance of all this is that it amounts to a full admission that at the time her injury was received she did not attribute it, by anything said or then suggested to those to whom she talked, to an unusual or violent lurching of the car, or to any improper operation of the train from which negligence could be inferred."

That court further said:

> "If it can be said that her testimony, *unsupported by a single circumstance*, raises a presumption of negligence, that presumption was

> overcome by evidence so convincing as to leave no room for reasonable doubt that the accident was not caused by any such extraordinary lurch as she describes."

It is evident that if in addition to the plaintiff's own narration of the accident she had offered any proof of "attending circumstances" from which a reasonable inference of negligence could be drawn that the Circuit Court of Appeals for the Fourth Circuit would have held that she had made out a *prima facie* case for the jury under the *res ipsa loquitur* doctrine.

The decision in the cases at bar is not in conflict with the decisions of the Fourth Circuit. We call the court's attention to the cases of *Chesapeake & Ohio Ry. Co.* v. *Needham*, 244 Fed. 146, (4th C. C. A.), and *Sprague* v. *Southern R. Co.*, 92 Fed. 59 (4th C. C. A.) Mrs. Needham claimed that while walking down the aisle of a car she was suddenly and violently thrown forward by a jerk of the car head long upon the floor. As to the lurching of the car she was "corroborated in the main by a young woman friend who was in the same car." The defendant offered six witnesses, "three of them passengers who saw the occurrence, to the effect that they did not observe any jolting of the car or other unusual motion." The Circuit Court of Appeals held:

> "In a word the plaintiff's proofs would sustain a verdict in her favor, while defendant's proofs show that she has no cause of action, this being the issue in dispute, we are of the opinion that defendant was entitled to the rejected instruction." (An instruction which required the plaintiff to prove by a preponderance of the

evidence that there was an extraordinary lurch of the car.)

In other words, the Circuit Court of Appeals for the Fourth Circuit held in this case that if a passenger on a moving train is injured by an extraordinary and unusual lurch of the train and the passenger offers corroborating proof thereof, such "proof would sustain a verdict" under the *res ipsa loquitur* theory.

In the Sprague case the plaintiff, a woman 67 years old, was riding as a passenger in a caboose which was standing still, then moved up, then stopped again, and "when it so moved up, it made a heavy jerk," and the plaintiff was thrown and injured. Plaintiff charged negligent operation of the train; the trial court dismissed the case and upon a writ of error the Circuit Court of Appeals for the Fourth Circuit reversed the case, holding that the plaintiff had made out a *prima facie res ipsa loquitur* case, and that the question whether the defendant had negligently handled the train was a question of fact for a jury, citing with approval:

Railway Company v. *Ives*, 144 U. S. 408.
Railway Company v. *Gentry*, 163 U. S. 353.

and the Pollard, Stokes, Tolson and Gleeson cases in this court.

6. **The decision of the Circuit Court of Appeals herein is not in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in Ozanne vs. Ill. Central R. Co., 157 Fed. 1004.**

In the Ozanne case the plaintiff, sixty-six years of age, was alone in the dressing room of a Pullman

car; she was "clubfooted," so deformed that her "feet were turned directly inward instead of straight forward in the usual way" (151 Fed. l. c. 901). The trial court said:

> "This misfortune made it necessary that she pass one foot over the other at each step, and * * * it may well account for her fall under the then abnormal conditions."

But the most important consideration concerning the Ozanne case is that the plaintiff did not attempt to recover upon the *res ipsa loquitur theory* of general negligence, but founded her cause of action *solely* upon the specific claim of negligence that the defendant was *negligent in failing to provide seats and handholds in the car.* In discussing this question, the trial court said:

> "There was no claim or testimony to show that there was any defect in the material nor in the structural perfectness of the car or of the ladies dressing room—the only claim we repeat is that the plan, form, etc., of that room were necessarily dangerous and that it was, *per se*, negligent for the defendant to run or use in its trains a car with a ladies dressing room of that sort."

Mr. Ozanne charged specific negligence and failed to prove it; that is all there is to that case. It does not in any manner conflict with the decision at bar.

7. The contention of the defendant that res ipsa loquitur carrier-passenger cases are confined to "collision, derailment and defective appliance cases" is wholly untenable.

The following Federal and State decisions disprove the contention:

Hanlon v. *Southern Pac. R. Co.*, 9 Fed. 2nd, 294.

Needham v. *C. & O. R. Co.*, 244 Fed. 146.

Kansas City Southern Ry. Co. v. *Clinton*, 224 Fed. 896.

Railroad Co. v. *Pollard*, 22 L. Ed. 877, 22 Wall. 341.

Gleeson v. *Virginia Midland R. R. Co.*, 140 U. S. 443, 35 L. Ed. 458.

Sprague v. *Southern Ry. Co.*, 92 Fed. 59 (Fourth Circuit).

Atlantic Coast Line R. Co. v. *Hamlett*, 89 So. 337, 81 Fla. 872.

Louisville Ry. Co. v. *Osborne*, 188 S. W. 419, 171 Ky. 348.

Abernathy v. *Lusk, et al.*, (Mo.) 182 S. W. 1049.

McMahon v. *N. O. Ry. & Light Co.*, (La.) 53 So. 857; 32 L. R. A. (N. S.) 346.

Jones v. *Chicago City Ry. Co.*, 147 Ill. App. 640.

Bell v. *N. Y. N. H. & H. R. Co.*, (Mass.) 104 N. E. 963.

Starkman v. *Interborough R. T. Co.*, 144 N. Y. S. 780.

Johnson v. *Atlantic Coast Line R. Co.*, (Va.) 99 S. E. 558.

Cooley v. *Dunham, Rec.*, (Mo.) 195 S. W. 1058.

McDermott v. *L. & N. R. Co.*, (Ky.) 206 S. W. 6.

Sever v. *M. & St. L. R. R. Co.*, (Iowa) 137 N. W. 937; L. R. A. 44 N. S. 1200.

Moreover, the attempted limitation of the doctrine is illogical and unsound. An illustration or two will suffice to show how untenable this proposition is.

Suppose a passenger is seated in a train and the adjacent window is open and there is such a sudden jerk and swerve of the train as to throw the passenger out the window; there is no derailment, no collision, no defective appliance involved. Could it be said that such fact alone would not create the inference that the train was negligently operated? Suppose in the case at bar the window at the rear of the berth had been open and Imogene Johnson, who was sitting with her back and feet braced to prevent being moved by an ordinary sway of the car, had by a sudden and violent jerk and swerve of the train been thrown diagonally across the berth and through the open window. No collision, derailment or defective appliance would be involved. Would the defendant claim that such violent and unusual movement of the train did not raise a reasonable inference that the train was negligently operated? Suppose instead of Imogene being thrown through the window, the window was closed, and while so braced she was thrown so violently against the rear corner of the berth that she broke her neck and at the same time Myrtle Johnson, who was bracing herself by her handhold on the partition between the berths, was thrown violently around and against the upper berth and fractured her skull and was thrown across the aisle to the floor, and there was no collision, derailment or defective appliance, could any court reasonably hold that such evidence

would not raise a reasonable inference that the train was negligently operated? Suppose this train was traveling at a rapid rate of speed and was coming to a curve which required the train to slow down "to take the curve" and the engineer negligently failed to keep a lookout for the curve and did not notice it until he was almost upon it and then suddenly slapped on the emergency brake so as to throw passengers violently about the cars, would that not constitute such a *prima facie* case of negligence as to require the defendant to meet it with such proof as it might have?

8. **The Supreme Court will not grant a writ of certiorari for alleged improper argument even though the Circuit Court of Appeals holds the argument improper and yet affirms the judgment.**

Michigan Mutual Life Ins. Co. v. Oliver, 256 Fed. 212.
Writ of certiorari denied June 9th, 1919, 63 L. Ed. 1187.

The Oliver case was a suit to collect insurance for death; the defense was suicide. The plaintiff's attorney in argument to the jury went outside the record and charged that defendant removed the case to the Federal Court in order to get away from "Conecuh County, where the public knew the facts of this case." The trial court upon objection ruled the argument proper; the Court of Appeals (Fifth Circuit) held the argument improper, but affirmed the judgment. Exactly what was done in the case at bar.

It is interesting to note that in the Oliver case the trial court instructed the jury that the law presumed

that deceased did not commit suicide, and that the burden was upon defendant to "overcome this presumption and *satisfy you by a preponderance of the evidence* that insured's death was voluntarily or intentionally inflicted."

The defendant petitioned for a rehearing and the Circuit Court of Appeals upon this subject said:

> "The charge on the subject of suicide and the presumption of law with respect thereto and the burden of proof was technically inaccurate."

Yet the judgment was affirmed and a writ of certiorari denied by this court.

9. **The argument complained of was proper; the record shows conclusively that the defendant attempted to prove "syphilis" as a defense, even though it put no witness on the stand to prove it.**

The Court of Appeals on this subject said:

> "An affirmative defense of this character cannot ordinarily be proved by cross examination."

We respectfully take issue with that statement. "Contributory negligence" and "assumption of risk," for instance, are affirmative defenses; they are proved every day *solely by cross examination*. Remember that the defendant in this case never had had the plaintiff examined by a physician before trial to determine her blood condition. Therefore, it was beyond its power to call a physician to testify as to her condition. The only thing left for it to do was to attempt to prove "syphilis" by cross examination of plaintiff's lay witnesses and physicians. That the defendant did

strenuously attempt to prove that defense, for sake of brevity, we cite the record.

See Record 149, 150, 184, 190, 191, 197, 198, 201, 205, 237, 311, 313, 347, 352, 353, 354, 355, 357, 359, 360, 374, 375 and 377.

The issue was first injected into the case by defendant's cross examination of Immogene Johnson at pages 149 and 150.

> "Did she show eruptions of the skin?" (A symptom of syphilis) and "Did * * * they give her hypodermic injections * * * or medicines internally" (ordinary treatment for syphilis).

The attending physician, Dr. St. Elmo Sanders, diagnosed the case as "Odema of the brain, resulting from injury." He prescribed iodide of potassium to absorb the clot on the brain. Throughout the trial defendant attempted to prove by cross examination that the doctors' diagnosis was wrong and that plaintiff had syphilis notwithstanding the Wassermann test showed negative. That such was the defense we only need to quote an excerpt from defendant's argument to the jury, Record p. 429:

> Mr. Marley: "Now, what do we have? I said nothing about this, but if you will remember they introduced a sheet made up by Dr. St. Elmo Sanders made on the 29th day of September, 1925, showing that on that day and on the 30th, the day following, he had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it, too, gentlemen. We know and the evidence of these physicians, medical men show, *that iodide of potassium was the old remedy for a specific trouble;* and right

on there was a Wassermann test. That suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment."

Here is a definite charge that iodide of potassium was given because the plaintiff had syphilis, and that Dr. Sanders was wrong in diagnosing the case as "Odema of the brain, resulting from injury."

The record is so voluminous and so full of proof that the defense was "syphilis" and that defendant injected such defense into the case, in view of the language employed by the Court of Appeals, we feel compelled to print as an appendix to this brief that portion of our brief in the Circuit Court of Appeals upon this subject, and for brevity, refrained from further agument.

The law has wisely given Federal Trial judges a wide discretion in controlling argument by counsel, and unless the record plainly and unequivocally shows a gross abuse of such discretion the Court of Appeals upon a writ of error will not reverse the trial judge, and particularly is this so when the defendant did not move to discharge the jury, or ask the trial court to admonish counsel, or request the court to instruct the jury upon the subject.

10. **The granting of a writ of certiorari in Northern Railway Company vs. Page, 274 U. S. 65, is not a proper precedent for a writ in this case, as contended, for the following reasons:**

a. The defendant in the Page case exhausted its remedies in the Circuit Court of Appeals by petitioning for a rehearing.

b. The opinion of the Circuit Court of Appeals in the Page case *shows upon its face* that it was based upon speculation and conjecture, and rested solely upon the highly speculative conclusion that because "the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was said until after the shooting began." And this in a case where the burden of proof was upon the plaintiff to establish the negligence of the defendant. The failure of a defendant's witness to testify upon the subject did not constitute affirmative proof needed by the plaintiff to make out a case.

c. The "uncontradicted evidence" established "that the shooting was an occurrence that could not reasonably have been anticipated," and hence, the defendant could not "be held liable for the injuries inflicted upon plaintiff by the Government forces."

c. The trial judge in the Page case set aside the verdict because of a total lack of evidence to prove negligence. Moreover, the opinion of the Circuit Court of Appeals was by a divided court.

11. **The granting of a writ of certiorari in the case of Gulf, Mobile & Northern Railroad Company, Petitioner, vs. Wells, 72 L. Ed. 152, is not a proper precedent for granting a writ herein, as claimed, for the following reasons:**

a. The Wells case arose under the Federal Employers' Liability Act and the writ was issued to the

Supreme Court of Mississippi, the defendant having exhausted all its remedies in the lower courts.

b. The case was decided by the Supreme Court of Mississippi "without opinion."

c. Plaintiff's testimony that while he had hold of the grab iron "he stepped on a big piece of coal, his foot turned, and he went down and the engine gave an unusual jerk" and he fell and hurt his knee, *was wholly uncorroborated.* The entire train crew testified there was no unusual jerk. Moreover, this court said: "There was no evidence that the engineer knew, or should have known, that Wells was not on the train." And further: "Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine." And: "In no aspect does the record do more than leave the matter in the realm of speculation and conjecture."

12. **Except in most extraordinary cases writs of certiorari should not be issued to review decisions of the Circuit Courts of Appeal in cases where the petitioner has failed to move for a rehearing under the rules.**

Very little consideration should be given a litigant who complains about a judgment such as this when it has refused to move for a new trial and thus give the trial judge an opportunity to pass upon alleged errors, and who then complains of the decision of the Circuit Court of Appeals and has refused to move for a rehearing with sixty days (Rule 29-C. C. A. 8th Circuit) and thus deprives that court of an opportunity to pass

upon alleged errors. Just plain common decent consideration for the trial judge and the judges of the Circuit Court of Appeals demanded such action.

Writs of error and writs of certiorari should not be allowed to supplant motions for new trials and petitions for rehearings. Before a litigant comes to this high court and asks for a writ of certiorari he ought to fairly exhaust his remedies in the Circuit Court of Appeals. This defendant did not do that. A motion for rehearing ought to be a condition precedent, under ordinary circumstances, to a petition for a writ of certiorari. The Circuit Courts of Appeal are just as anxious to correctly decide cases such as these as this court could possibly be, and the rules allow the defeated party sixty days in which to move for a rehearing. Good faith and fair treatment of that court compels such course of procedure. Of course there are cases where writs of certiorari ought to be granted, but this case is not one. No matter of public importance is involved—this is a purely private controversy—no general principle of law has been wrongly applied so as to constitute a bad legal precedent, there is no conflict with decisions of other circuits; to grant this petition and issue the writs prayed for will open the flood gates for petitions in a myriad of cases. The petitions should be denied.

Respectfully submitted,

JOHN H. ATWOOD,
OSCAR S. HILL,
PRICE WICKERSHAM,
CLARENCE C. CHILCOTT,
Attorneys for Respondents.

APPENDIX A.

(STATEMENT OF FACTS IN RESPONDENT'S BRIEF IN CIRCUIT COURT OF APPEALS.)

STATEMENT.

The "statement" in plaintiff in error's brief is inadequate because it does not properly or sufficiently set forth the facts upon which liability is predicated. It is admitted that plaintiff, Myrtle Johnson, was a passenger on one of defendant's trains, running from New York to Chicago on September 27th, 1925, occupying berth lower 8, car 64 (Rec. p. 105), said berth being on the right-hand or north side of the train as it was traveling west. The plaintiff and her sister-in-law, Imogene Johnson, had left Kansas City "the last of August" (R. 103) and had gone to California, Washington, St. Paul, and Chicago, arriving in New York "about five or six days" (R. 104) prior to the injuries complained of. They left on their return trip September 26, (R. 105) stopping over night at Nyack, N. Y., with "a girl friend of mine who was secretary of the Country Club" (R. 105); they then boarded the New York Central train at Harmon about six-thirty (6:30) p. m. September 27th (R. 105) and their grips were put in their berth (106) and then after going into the ladies room and washing up they took off their coats and left them in their seats, keeping their hats on, and then "went back to the dining car where we had a lovely dinner there in the diner" (R. 106); they re-

mained in the dining car "quite awhile" (p. 107); "As both had unusually good appetites that night" (p. 107); they then started to go to the club car and on the way "passed through our car" (p. 107); at that time "they had begun making down the berths" (p. 107); they stopped and "got a deck of cards out of our grip" (p. 107) and went to the club car where they played "rummy" until "sometime between eleven and midnight" (p. 107); and then they went back to car 64 to go to bed; at that time "just the night lights (were) burning" (p. 107); all the other passengers in that car had gone to bed (107); Myrtle preceded Imogene to the berth (p. 107); they decided that they would not take their heavy suit cases back to the dressing room in order to prepare for bed, and that they would take their night clothes out of the grip and take them back to the dressing room (R. 108); Imogene was the one who attempted to get the night clothes out of the grip (108); Myrtle, having preceded Imogene, stood in the "aisle at the foot of the berth, near the foot of the berth, and she stood there clutching on to several folds of curtains her hand sort of placed in the partition at the foot of the berth that separates it from the berth just below," (R. 108), Myrtle was "partially facing" Imogene (R. 108); Imogene "sat on the side of the berth about like this, with my leg braced here, and my back braced here on the arm, as you know, that comes out from the berth, * * * I had my back * * * to the direction we were going" (R. 108); Imogene then testified:

"Q. Now, tell the court and jury what happened there?

"A. Well, just as I opened the suit case, threw the lid back and was just reaching in for the night things and we were going along at a very good speed, this train had been going at a good speed all evening, and just as I threw this lid back and started reaching for my night things, there came the most terrible jerk, almost as though the train were going to stop, but didn't and jerked and swayed and went on, and at the time of this jerk, I, of course, was braced here against this arm of the seat, or the berth, the side of it, and after it yanked and went on it threw me across, diagonally across my berth toward the foot, the lower end and right side of the train, lurched on to the bed clothes at the foot of my berth."

Imogene further said:

"No, I was sitting on the berth with my back braced against the arm of the seat" (R. 142),

and

"I was just sitting here with my foot braced in the aisle" (R. 144),

and

"This was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced" (R. 112); "The sudden lurch, * * * swung her (Myrtle) around" (R. 145); "She was trying to hang on to the curtain" (R. 145).

Myrtle testified:

"I was standing there holding on to the curtain," "with my right hand" (R. 274); "Had it just below the upper berth, just holding it below the upper berth and securing it on the board that

separates the two berths and my left hand on my hip" (R. 274);

and

"I was protecting myself, or bracing myself • • • I was standing there steadying myself" (R. 305)

and

"The train gave an awful jerk and jolt and a terrible lurch" (R. 275);

and

"And I had my hand hold of the curtain just below the lower part of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on my hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw my head up against the edges of the upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor" (R. 276-7).

and then

"Everything got black and I got sick at my stomach, and the next I remember I was sitting up on the berth" (R. 277).

Imogene, although bracing herself with her foot in the aisle and her back against the arm of the seat, and although she weighed 160 pounds (R. 94) "was violently thrown diagonally across our berth, my leg hanging off, that is, would be in the air, and my left hand clutching the sill of the window at the lower end of the berth and my other hand and arm over the cover

of the suit case and clutching at the bed clothes at the foot of the berth" (R. 109); Imogene heard Myrtle moaning and scrambled to her feet to see what had happened to her (109). She was sitting in the aisle toward the berth across the aisle, but nearer the head of the berth toward the engine (109); Myrtle was "rocking back and forth in the aisle saying 'Oh, my head, Oh, my head' and I believe she said 'Oh, my God' " (R. 110); she then helped Myrtle up and put her on the edge of the berth and "rubbed her head and talked to her" (110); Imogene then helped Myrtle to undress and put her to bed; all the other passengers had already retired; what happened when they awoke the next morning is best told by Imogene (R. 114):

> "A. Well, I felt something clutching at me, and something seemed to be jerking at me, and I was half asleep, and I didn't know what it was, and so I didn't get right up, or awaken right away, and it continued, and then I became conscious that there was a noise, a gurgling, a peculiar noise as though someone were crying and moaning, and so, of course, that came through my consciousness finally, that something was wrong and I sat up and she was sitting up behind me reaching over with her left hand and trying to get my attention, with her face all drawn, and telling me something that I couldn't understand, and crying and clutching at me."

Myrtle was paralyzed on her entire right side, the right side of her face was "drawn as if someone had pulled it over to the left side" (114); Myrtle was uttering "inarticulate sobs"; it was a crying as though she was trying to make noises and they couldn't come out the way she wanted them to" (R. 114); her arm

and leg were "clammy and cold" (R. 115); Imogene tried to aid Myrtle by massaging and starting the circulation; (R. 116) she then "rang for the porter" (116) and "asked the porter to get the conductor quickly" (R. 116); the conductor came (116); she "*asked the conductor to see if there was a doctor on the train, that my friend had been hurt the night before in that jerk and something had to be done for her quickly*" (p. 116); no doctor could be found, but "The conductor said he thought there was a nurse on the train" (116); the conductor brought the nurse and "I told the nurse about the accident the night before" (116); Imogene "asked the conductor to wire ahead to the nearest station where we would be for any length of time and have a doctor there and he told me that he would wire at the next station for a doctor to meet us in Chicago" (117); a doctor did meet her at Chicago. "The physician and the conductor carried Myrtle out of the train" (118); Dr. Pearce, the company doctor, made a superficial examination of her (R. 119); then she was put in a wheel chair, and then a taxi, and taken to the Dearborn Street station where she was put in a compartment on the Santa Fe (119) and brought to Kansas City, where she was met by a doctor (120) and taken to Grace Hospital. *Up to this time Myrtle was unable to talk, one-half of her tongue being paralyzed;* Dr. Sanders diagnosed her case as "odema of brain from injury causing partial paralysis of right side" (R. 159); from that time on until the time of the trial she was under the care of various doctors and osteopaths who testified that her condition was permanent and

incurable; as the railroad company is not and cannot under writ of error raise any contention as to the amount of the verdict any further statement of her injuries and present condition is unnecessary. The record is filled with evidence that at the time of the accident on September 27, 1925, the plaintiff and Imogene both weighed about 160 pounds (R. 94) (plaintiff at the time of the trial weighed about 130 pounds and after the accident weighed only 118 pounds); that before she was hurt she was in "perfect health," "good color and bright, clear eyes, athletic"; "she was a perfectly normal woman up until the time" of the accident (R. 361); she had a "rosy" complexion (329); she had never had treatment by any doctor prior to her injury and had never been sick "in any way, shape or form prior to the injury" (R. 290); at the time of the trial she was but a shadow of her former self; she looks "lifeless; pepless;" (R. 322). She talks incoherently, "she will talk to you for instance and break off in the middle of a sentence and start talking about something else" (R. 322). "She drags her right foot" (R. 321) like a hemiplegic; "She can't wash dishes, she would drop the dishes" (322); "She cannot carry on her business as a hair dresser" etc. etc. She is a confirmed invalid.

The extraordinary lurch or jerk or sudden stopping and sudden starting of this train catapulted Imogene Johnson, who was sitting at the front end of the berth *with her right foot braced upon the floor and her back braced against the arm of the seat,* violently against the rear corner of the berth with her hand clutching the window sill of the rear window and her

feet hanging out in the air; the sudden and violent lurch was so great as to tear Myrtle's grip from the partition between the two berths which she was using to steady herself and threw her around and crashed her head against the upper berth tearing her grip from the curtains and throwing her to the floor of the car; the crash of her head was so great as to cause a lesion and hemorrhage of the brain, the scar tissue from which was plainly shown in the X-ray pictures offered in evidence. Defendant admitted that "all of a sudden there was a check of the car and it pitched her forward • • • The tendency is just like the cracking of a whip" (p. 431). Defendant admitted that there was evidence of a "thickening of the pia mater of the brain" (253). It was conclusively established that such scar tissue and thickening was over the motor area of the brain that affects the right side of the body.

The qualifications of Imogene and Myrtle to testify as to the "extraordinary movement of the train" were amply proven. These two women had been extensive travelers and the record shows that each of them had traveled at least fifteen thousand miles before this accident (111). To meet this strong *prima facie* case of negligence, the defendant put upon the stand certain of the train crew who testified that they did not know anything about the cause of the accident, but we submit that an examination of the testimony of each one of these witnesses will show that their testimony is worthless and that each one of them was impeached. It appears undisputed that on the morning following the accident the conductor of the train wired for a doctor

to meet the train at Chicago and that he was told about how the accident happened, yet the defendant failed to put upon the stand a single passenger who had a reservation in that car and who must have known about the accident and the condition of the plaintiff all the next day enroute to Chicago. The defendant did not put upon the stand the engineer or fireman of the train—most important witnesses, nor the nurse who attended plaintiff and who knew about the accident.

Kates, the colored Pullman porter, did not testify as to where he was when the accident happened. He admitted that he got the conductor of the train to see the plaintiff (p. 384); the colored maid, Emmy Mathews, while testifying that she did not remember anything unusual in the movement of the train became completely confused in her testimony as to the condition of the plaintiff the following day and thought that "drinking lemonade might paralyze a person" (391); she was thoroughly discredited.

Martin Kane, the train conductor, testified that he did not remember any unusual jerk or jar on that trip (393), but that his attention had been first called by the claim department to this accident "a couple of months, at least, after the accident." *It was the conductor of the train, to-wit, Kane, who wired ahead for a doctor, and hence he was thoroughly discredited by his own testimony.* The rear flagman, John B. McCormick, testified that he didn't learn anything about the plaintiff being hurt (395), but his testimony was discredited because of his cross examination appearing on page 396.

The passenger brakeman, Jerome S. Connors, testified that he didn't remember any unusual jerk of the car (398), but his testimony was likewise discredited because he admitted that the first time his attention had been called to the case was when he "was ordered to go to the claim department in Buffalo" (398) and he couldn't remember what year it was that he was ordered there he never even heard about the plaintiff being injured. His testimony amounted to nothing.

Walter Vernon, the Pullman conductor, was not even asked by defendant's counsel if he felt or observed any unusual lurch or movement of the train; he merely testified that the first he learned about the plaintiff striking her head was the next morning; that "she had a stroke or something and was very ill" (400); he became thoroughly discredited by claiming to have talked with Myrtle Johnson the day following the accident and when it was definitely established that her tongue was so paralyzed that she could not talk. He admitted that a trained nurse, "a white lady" (404) was found on the train to treat the plaintiff, a witness which the defendant did not produce. He was clearly discredited in his testimony concerning the condition of plaintiff after the accident and saying that the first time that any claim agent or lawyer for the railroad had ever discussed his evidence with him was when he took the stand (408), notwithstanding the fact that he came from New York for that purpose.

The above were the only witnesses for the defendant who were on the train, and one of them said that

the plaintiff claimed that she stumbled over a grip, and another said that the plaintiff claimed that she bumped her head while getting over her sister in the berth, both stories being positively untrue. These two witnesses were discredited by defendant's own counsel who admitted in his closing argument that Myrtle and Imogene both told the truth (p. 427). *There was no explanation whatever offered to rebut the positive proof of the plaintiff.* Such was the state of evidence at the close of the case, and the jury was thoroughly justified in disbelieving defendant's witnesses and returning a verdict for the plaintiffs. The defendant knew the morning following the accident that Imogene was claiming that Myrtle had been seriously hurt by a violent lurch of the train, and the defendant was in a position through its conductor, to obtain the names of all persons in that Pullman car or that train; the reservation cards were available to them when the lawsuit was brought. The failure to produce any passenger on that train, the nurse, the engineer and fireman is very significant. The defendant wholly failed to rebut the plaintiff's positive evidence, and the presumption which arose from such facts.

Defendant's counsel in his closing argument (p. 427) said:

> "I believe Imogene and Myrtle both undertook to tell the truth according to their understanding of the situation—I don't think either one undertook to misrepresent, and I want to say to you that I don't believe any of them did."

After commenting upon the fact that the plaintiff produced 21 witnesses to testify "to the condition of this poor woman" (p. 427) he said:

> "You didn't need those witnesses to tell you her condition. You could tell it by looking at her on the witness stand."

Defendant's counsel further admitted (431) "but all of a sudden there was a check of the car and it pitched her forward • • • it pitched her forward. The tendency is just like the cracking of a whip."

Defendant's counsel in his closing argument did not even claim that Myrtle Johnson was negligent in any manner.

APPENDIX B.

(RESPONDENT'S ARGUMENT IN CIRCUIT COURT OF APPEALS IN RE ALLEGED IMPROPER ARGUMENT.)

The court did not commit error assigned in Specifications XX, XXI, XXII and XXIII; the defense was "syphilis"; the arguments complained of were proper; the exceptions were inadequate; the limits of argument are within sound discretion of trial court.

We will discuss these assignments together because they cover the same subject. The court did not err because:

(a) The defendant by cross examination attempted to prove that Myrtle Johnson was suffering from syphilis and that was the only defense relied upon, so far as the extent of damages was concerned.

(b) The control of argument by counsel is a matter within the sound discretion of the trial judge, and there was no abuse of discretion.

(c) The objection made to the argument was foundationless and inadequate.

(d) After the argument of Mr. Chilcott, complained of in Specifications XX and XXI, counsel for defendant in his closing argument (p. 429) again charged that Myrtle Johnson was suffering from syphilis.

(e) Defendant did not move to discharge the jury and/or did not request any instruction to the jury on the subject.

That the defendant in its cross examination of practically all of plaintiff's witnesses attempted to

prove that Myrtle Johnson was suffering from syphilis, and that that was the cause of her paralysis, is easily demonstrated by a reading of the record. The attempt to prove that she was suffering from syphilis began with the very first witness, Imogene Johnson, (page 149) and continued and persisted with practically every witness thereafter. The cross examination on this subject is too voluminous to quote in this brief. It will be found upon the following pages of the Record: 149, 150, 184, 188, 190, 191, 197, 198, 201, 205, 237, 311, 313, 315, 347, 352, 353, 354, 355, 357, 359, 360, 374, 375, and 377.

Beginning with Imogene Johnson counsel sought to show that Myrtle Johnson had an "eruption of the skin" (which is one of the symptoms of syphilis); "didn't it look a little bit as though it was a kind of pimple and yet it wouldn't come to a head" (p. 149), (a symptom of syphilis); defendant tried to get Imogene Johnson to say that Myrtle Johnson had "hypodermic injections" (p. 150), (ordinary treatment for syphilis); at page 184 plaintiff asked Dr. St. Elmo Sanders "has all the improvement that is to take place, taken place," and Mr. Marley objected because the question did not include "any tests of the blood that he made, now. There is a treatment here, iodide of potassium and all those elements ought to be taken into consideration in giving an opinion upon this point" (iodide of potassium is a well recognized treatment for syphilis); at page 188 defendant again asked Dr. Sanders about his administration of iodide of potassium (attempting to show it was given for syphilis);

and at page 191 defendant sought to prove in its cross examination of Dr. Sanders that "they some times take blood tests that show negative, when as a matter of fact there is a positive condition there" (the inference sought was that Myrtle Johnson had syphilis regardless of the negative test); and by the same cross examination on the same page defendant attempted to prove that even though the syphilis was not in active form there was present a "luetic condition," and that the proper thing for the doctor to have done was to have taken a spinal test and not have relied upon a blood test; in the cross examination of Dr. Richman (p. 197) defendant sought to show that the Wassermann test was unreliable and that the plaintiff might have had syphilis regardless of the negative finding by the blood test and that even though there was a negative finding she still might have a "leutic condition" of syphilis, and that when the syphilis "gets down into the nerves and the tissues" a lumbar test should be made (p. 198); and that if the attending doctor "had a suspicion in his mind that the *plaintiff* was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?" (p. 198); (later examination shows that defendant contended that neurosyphilis was that stage of syphilis in which the disease germ, "spirochaeta pallida," became active in the nerves and their sheaths); in the cross examination of Dr. Bahr (p. 201) the defendant sought to prove the same thing and that the attending physicians ignorantly or negligently failed to make a spinal column test, the

inference being perfectly plain that the defendant was contending that Myrtle Johnson had syphilis which fact could have been proven if a lumbar test had been made; in the examination of Dr. St. Elmo Sanders at page 205, the subject of "locomotor ataxia" was discussed when defendant's counsel said: "I don't believe there is a question of locomotor ataxia in this case at all," and then Mr. Wickersham said: "If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question." And then Mr. Marley said: "I am saying now there was nothing said about locomotor ataxia, and he's going into something that isn't within the range of the testimony as developed at this time * * *." Upon objection being sustained, Mr. Wickersham said: "The idea was, Your Honor, that the evidence about the blood tests—I want to go into it if there was any question about it." (It will be noted that Mr. Marley was merely claiming there was no evidence of locomotor ataxia, but was claiming, nevertheless, that Myrtle Johnson had syphilis and not locomotor ataxia); at page 237 when certain X-ray pictures had been identified and offered in evidence, Mr. Marley objected to their reception in evidence, "Because it would embody any mistakes they made in the diagnosis of her case" (Mr. Marley was still hammering at "syphilis" before the jury); in the cross examination of Myrtle Johnson, page 311, defendant tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvorsan" (a treatment for syphilis); and again at page 313 counsel tried to bring out that the internal

medicine administered was "bismuth," and at page 315 that "hypodermic injections" were administered; in the examination of Dr. Geraughty at page 347 the doctor had testified that plaintiff's skin was "perfectly clear, no existence of eruption" and he was then asked about the "bony condition" and he answered: "In syphilis the bones of the body seem to be affected very prominently, pains in the bones, especially in the shin bones, it has been very characteristic in the chronic cases," thereupon Mr. Marley said: "We object to that because there is no evidence of a chronic case," and Mr. Wickersham said: "Let the record show that he doesn't claim that," then Mr. Marley said: "The chronic case would be in the tertiary state" (plaintiff was attempting to show that syphilis did not exist in any stage, either first, second or third), and when the doctor stated that pains in the bones were characteristic in the chronic cases, meaning third stage, Mr. Marley objected because there was no evidence that the disease in this case was in the third stage, but would make no admission that it did not exist in the first or second stages; and it is plain, beyond dispute, that the defendant was claiming that the plaintiff was suffering from syphilis in the second stage, that is, after the first stage when the syphilis germ "gets down into the nerves and the tissues" (p. 198); that defendant was claiming that she was suffering from syphilis in the second stage is clearly evident from the defendant's cross examination of Dr. Geraughty and particularly at page 353 where the following occurs:

> "A. As a rule the secondary state, secondary symptoms is the skin."

"Q. This germ is what is called the spirochaeta?"
"A. Yes, sir."
"Q. Spirochaeta pallida, that is the full name, the first test they use is what is call the Wassermann test of the blood to find out that condition?"
"A. Yes, sir. Wassermann test is used."
"Q. After it gets beyond that stage and gets in the stage of neurosyphilis, the blood test is not accurate" (the defendant was contending that the taking of the Wassermann test and the giving of iodide of potassium, and the general conditions demonstrated that the plaintiff had syphilis and that being in the second stage of syphilis, to-wit, neurosyphilis, the blood test which was given was not accurate and that the defendant could rightfully contend that she had syphilis in the second stage)."

Defendant evidently tried to show on the cross examination of Dr. Geraughty (p. 354) that the doctor "became suspicious of locomotor ataxia"; and on the same page attempted to show by the doctor that "**lesions in what is called neurosyphilis**" "**come along in the tissues and form along in the nerves what is called gummatous formations,**" and "tubercules" that "press on the nerves, the tissues that is next to it" and "**keeps on increasing until it presses down and paralysis is the result**" and that such pressure "is along the arachnoid membrane," which "is between the dura mater and the pia mater" and that "it also gets in the meninges" which "covers the brain, the spinal cord and everything" and "**after that is done, don't it begin to form there so as to paralyze one side of the body** and by pressure cause what you call occlusion" (p. 355), and "presses down, and isn't there a formation there what you doctors call a thrombosis forma-

tion" (*here was a definite attempt by counsel for defendant to prove that the paralysis in question was due to syphilis and not to traumatism*); at page 357 defendant's counsel again sought to prove syphilis and asked Dr. Geraughty, on cross examination: "**Now isn't it a fact, Dr. Geraughty, that in neurosyphilis that it is slow and insidious, it is true, but it sometimes reaches a state that even a slight shock will bring on the paralytic stroke, hemiplegia, as you call it**" (another positive attempt to show that plaintiff had syphilis); at page 359 defendant on cross examination of Dr. Hines said: "Doctor, did she tell you that she had a Wassermann test and that it showed positive?" (an effort to prove syphilis). On cross examination of Dr. Mella, page 360, defendant's counsel asked: "But doctor, you didn't make any examination as to a blood condition at all" (defendant again directs the jury's attention to syphilis); on the cross examination of Dr. Krall, page 374, defendant again tried to show that plaintiff admitted that the Wassermann test showed positive, and at page 375, attempted to show the administration of bismuth.

The cross examination by defendant of practically every witness furnishes abundant evidence that defendant was attempting to prove that plaintiff had syphilis and when Mr. Chilcott in his argument charged: "That is the defense in this case, that she had the syphilis" Mr. Marley merely said: "I object to that, Your Honor, there is no evidence of that at all, it isn't proper argument." Can there be any question as to the propriety of the court's ruling that "The objection is over-

ruled, in view of the examination of the witnesses, and of the testimony in the case?" The sole objection was: "There is no evidence of that at all." The record is full of evidence that such was the defense. It was clearly established that that was the defense. The limit of argument upon matters in evidence is a matter within the sound discretion of the trial judge and the court's ruling was right and proper.

Moreover, after Mr. Chilcott had concluded his argument, Mr. Marley in his own argument to the jury directly charged that the plaintiff was suffering from syphilis (p. 429).

In Mr. Marley's closing argument to the jury he said (p. 429):

> "Now, what do we have? I said nothing about this, but if you will remember they introduced a sheet made up by Dr. St. Elmo Sanders made on the 29th day of September, 1925, showing on that day and on the 30th, the day following, he had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it, too, gentlemen. We know and the evidence of these physicians, medical men show that iodide of potassium was the old remedy for a specific trouble; and right on there was a Wassermann test. That suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment."

This statement by counsel for the defendant, when properly understood and analyzed, shows definitely that the defendant was charging that Myrtle Johnson was suffering from syphilis. It is a positive admission that the defense was "syphilis."

The "sheet" referred to by Mr. Marley is Plaintiff's "Exhibit 4 A" (p. 159) and also Plaintiff's "Exhibit 4 C" (195). The first exhibit referred to shows Dr. Sanders' final diagnosis as follows: "Oedema of brain from injury, causing partial paralysis of right side." That is the "positive diagnosis" which Mr. Marley refers to. He then says: "We know and the evidence of these physicians, medical men show that iodide of potassium was the old remedy for a specific trouble." The "specific trouble" Mr. Marley refers to is syphilis. All through his cross examination of the doctors he speaks of syphilis as "specific." He told the jury that Dr. Sanders had not only given the plaintiff a Wassermann test, but had commenced to give her iodide of potassium which Mr. Marley claims was an old recognized medicine to be given for syphilis. On page 188 of the record Mr. Marley cross examining Dr. Sanders said:

> "Q. Now, I notice here you gave her iodide of potassium?
> A. I did, yes, sir.
> Q. What is that for?
> A. That is for the absorption of any brain edema or any possible clot or exudate that may be there."

Now it is clear that Dr. Sanders' diagnosis was "oedema of the brain from injury" and that he administered iodide of potassium for the purpose of absorbing any brain oedema or any possible clot or exudate that might have been there, but Mr. Marley, openly charged, in his argument above quoted, that the plaintiff had syphilis and that Dr. Sanders, administered

iodide of potassium as a remedy for syphilis. He did not use the word "syphilis," but his meaning is plain and clear. A juryman would be dumb indeed who did not understand that Mr. Marley was charging that the plaintiff had syphilis and that Dr. Sanders was giving her iodide of potassium as a treatment for syphilis and that Dr. Sanders had made a "wrong diagnois," and if the plaintiff had oedema of the brain Dr. Sanders was "giving this poor woman the wrong treatment," and should have given her some other treatment. To repeat, the sum and substance of Mr. Marley's argument that when Dr. Sanders diagnosed the plaintiff's injuries as "Oedema of the brain from injury" such diagnosis was wrong and the fact that Dr. Sanders took a Wassermann test and gave to the plaintiff iodide of potassium was positive evidence, in his opinion, that the plaintiff had syphilis; no other reasonable conclusion can be drawn from the argument of defendant's counsel and it was perfectly right and proper for the plaintiff's counsel in their argument to the jury to comment upon such a charge and it was perfectly proper to comment vigorously. The fact about the matter is the plaintiff so conclusively established that she did not have syphilis that defendant's counsel attempted to repent of his error before his final argument was concluded. Defendant, by its extended cross examination of the plaintiff's doctors upon the subject of syphilis and attempting to prove that she had syphilis and by the closing argument in which he charged that she had such "specific trouble" opened the door for comment by plaintiff's counsel upon such defense.

Let us assume as a fact that plaintiff did not have syphilis at all, and that defendant had no evidence whatever to prove that she did have syphilis; then the attempt of defendant's counsel to prove she had syphilis was contemptible; it was a terrible thing to do; it was an attempt to put a stigma upon a pure and innocent woman; an attempt that any lawyer was in duty bound as an advocate and as a man to sternly denounce. Syphilis is defined by Webster as "a chronic, specific, contagious venereal disease." It is loathesome—something to be shunned. A woman is not considered "decent" who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious, venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law. No court will ever take from such a woman a just judgment because her lawyer exposed such a contemptible defense.

The trial court heard the evidence, saw the witnesses, observed their manner and demeanor, heard the defendant's counsel cross examine the plaintiff and her doctors, observed his manner, intonation, inflection and emphasis, understood the nature of the defense, the charges and insinuations, knew and understood the whole "atmosphere" of the trial, and was

thus in a far better position than any appellate court could possibly be to determine what the defense was and what were the proper limits of argument. The law has wisely given Federal trial judges a wide discretion in such matters, and unless the record plainly and unequivocally shows a gross abuse of such discretion the court of appeals upon a writ of error will not reverse the trial judge, and particularly is this so when the defendant did not move to discharge the jury or ask the trial court to admonish counsel or request the court to instruct the jury upon the subject.

Dunglison's Medical Dictionary says that while the etymology of syphilis is unknown, that it is very probably derived from the Greek word "siphlos"—formed, by a contraction from "sipalos"—meaning "*a reproach.*" It is a "chronic, specific, contagious venereal disease."

To falsely charge that a woman has syphilis is libelous or slanderous *per se.* Were it not for immunity arising because the charges were made in court, the defendant would be liable in damages to the plaintiff, the proper innuendo being laid.

Odgers in his work on Libel and Slander (4th Ed.) 1905, page 48, Sec. 2 says:

> "Words imputed to the plaintiff that he has an infectious or contagious disease, are actionable without proof of specific damage. *For the effect of such imputation is naturally to exclude the plaintiff from society.* Such disease may be either leprosy, venereal disease, or it seems the plague * * *. Any words which hearers would

naturally understand as conveying the meaning that the plaintiff then has such a disease are sufficient."

Newell on Libel and Slander (3rd Ed.), 1914, p. 240 says:

"Defamatory words falsely spoken, of a person which imputed that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society, are actionable within themselves without proof of specific damages."

The court in *Golderman* v. *Stearns*, 7 Gray (Mass.) 181 says:

"The charge against a person of his having the venereal disease is held to be actionable * * *, not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease * * * and with whom it is unsafe to associate."

36 C. J. p. 1167 says:

"The general rule is that to charge one orally with a disease which would wholly or partially exclude him from society is actionable *per se*. * * * The principle has been applied to venereal disorders." Citing *King* v. *Pillsbury*, 115 Main 528; *Simpson* v. *Press Pub. Co.*, 67 N. Y. S. 401; *Watson* v. *McCarthy*, 2 Ga. 57; *McDonald* v. *Nugent*, 122 Iowa 651, and others.

"License of speech of counsel in addressing the jury is largely within the discretion of the trial court which has power to regulate or control the argument" 38 Cyc. 1472.

Mr. Marley in his closing argument said that he believed Myrtle and Imogene told the truth: "I don't

think either one undertook to misrepresent" (427); he also said: "I have known Imogene ever since she was a girl. I knew her mother, and a grander woman than her mother never lived. * * * I know her desire to tell the truth, and I believe Myrtle's desire was the same."

Mr. Marley personally knew these people and admired them, and justice to him demands the statement that he personally was not and could not be the instigator of such slanderous charges, and that as local counsel he was merely following the defense outlined by his associate. Everything that occurs at a trial is not taken down by the reporter and that is why trial courts are accorded discretion in matters of argument, and that is why the court said: "Counsel may draw inferences from the facts as he sees them."

In the case of *Straus* v. *Ry. Co.*, 86 Mo. 421, where a passenger was injured by the sudden starting of a car, counsel for plaintiff in his argument to the jury commented vigorously upon the failure of the defendant to produce a certain witness, to which argument defendant objected and "asked the court to interfere and rebuke counsel for discussing facts not in evidence" and "the court interfered no further than to tell the jury, in substance, that they were only to consider such matters as were shown by the evidence." The supreme court said:

> "The circuit judge who heard these remarks, and was cognizant of the circumstances under which they were made and who was presumably

> acquainted with the intelligence of the jury to whom they were made, and with the ability of counsel for the defendant, who were to follow Mr. Green, to explain to the jury" his contentions, "was in a better position than we are to determine how far he should interfere and rebuke counsel and whether what was said would or not be likely to prejudice the jury against the defendant. * * * Can we say that the trial judge exercised his discretion improperly in not going further than this? If so, what rule shall be laid down for the Government and guidance of *nisi prius* judges in such cases? Looking at it from my standpoint and presuming, as I may (what the circuit court, perhaps, knew), that those who composed the jury were men of ordinary intelligence, and understood the obligations of the oath they had taken, such remarks, if calculated to prejudice them at all, would be more likely to prejudice them against the plaintiff than defendant, because of his counsel having resorted to a line of argument so easily exposed and turned against him."

In the case of *Allen* v. *Autenrieth*, 280 S. W. 79, the court said:

> "It is largely for the trial court to determine the extent to which he shall interfere because of improper argument, and, unless such discretion has been clearly abused, the appellate court will not reverse the judgment for such cause."

In the case of *Asadorian* v. *Sayman*, 282 S. W. 507, the court said:

> "By virtue of his position the trial court was in an infinitely better position than this court to observe the effect of the reference to the result of the former trial upon the jury."

In the case of *Plannett* v. *McFall*, 284 S. W. 850, the court said:

> "Suffice it to say, it is largely for the trial court to determine whether counsel, in the conduct of a case and in argument to the jury, transcend the limits of professional duty and propriety, and, unless there has been a clear abuse of such discretionary power, it is not within the province of an appellate court to interfere."

The plaintiff in error does not contend that the verdict for the plaintiff was excessive, indeed, such question could not be raised under a writ of error. The fact that the plaintiff did not make a motion for new trial upon this ground is impelling proof that the verdict is not excessive even in the opinion of the defendant. So it must be admitted that the verdicts are not excessive, and they are, we contend, for the right parties.

The court in the case of *Brady* v. *Traction Co.*, 140 Mo. App. 421, said in discussing the argument of counsel which they held improper.

> "We conclude that the only proper verdict that could have been rendered was a verdict for plaintiff, and that the damages assessed, * * * are not excessive, and we, therefore, have reached the conclusion in this case, that the remarks of the counsel for plaintiff, improper as they were, did not effect the result."

In the case of *Grand Trunk Ry. Co.* v. *Blay*, 297 Fed. 605, (Second Circuit), the plaintiff in error claimed that counsel for the defendant in error made an improper statement in the presence of the jury concerning an absent witness, to-wit: "that confirms my

theory that the Grand Trunk Railway Company have got her." Counsel for plaintiff in error then said: "I desire an exception to that remark." The court in passing upon this matter said:

> "Counsel for the plaintiff in error did not ask for an instruction to correct the impropriety of this remark. He did not request that the jury be cautioned to be uninfluenced by it, or that they disregard the remark. To make available the impropriety of this remark as an error at the trial, it was incumbent upon counsel for the plaintiff in error to ask for some instruction to the jury to disregard the remark, or be uninfluenced thereby. A mere exception to the remark was insufficient."

[redacted]

[redacted]

[redacted]

INDEX

Statement of Case 1

Citations to Record showing defense was "Syphilis" 4

Brief 12

Argument 14

SUMMARY OF ARGUMENT

1. These cases do not involve important public questions 14
2. Practice of Supreme Court in similar cases 14
3. Analysis of opinion of Judge Symes 15
4. Argument concerning argument complained of 20
   (a) Plaintiff's knowledge that defense would be "Syphilis" 20
   (b) The defense was "Syphilis" 21
   (c) The defendant did not object to argument about syphilis. The objection was limited to charge that syphilis would "bar plaintiff from society" and that plaintiff charged defendant was claiming plaintiff was "indecent" 39
   (d) To falsely charge that a woman has "Syphilis" is libelous or slanderous *per se* 43
   (e) The control of argument rests in sound discretion of trial court 44
   (f) After arguments now complained of defendant declined to request jury be instructed thereon though court gave defendant the opportunity 50
   (f1) Trial court's remarks to counsel at close of case 51

(g) The argument was not prejudicial 52
(g1) Defendant admitted plaintiff told the truth 53
(g2) Defendant admitted that the lurch of the train "like the cracking of a whip" caused plaintiff to be injured 53
(g3) Defendant admitted it was not necessary for plaintiff to use 21 witnesses to prove the "condition of this poor woman" 57
5. Conclusion 59

CASES CITED

A. T. & S. F. Ry. Co. vs. Nichols, 2 Fed. (2nd) 12 ..... 13, 42
Bieseker vs. Moore, 174 Fed. 368 ..... 13, 42
Bliss on Code Pleading, Sec. 329 12
Brady vs. Traction Co., 140 Mo. App. 421 ..... 13, 48
Federal Trade Comm. vs. American Tobacco Co., 71 L. Ed. 1193 12
Ford vs. Kansas City, 181 Mo. 329 12
Golderman vs. Stearns, 7 Gray 181 ..... 13, 43
Grand Trunk Ry. Co. vs. Blay, 297 Fed. 605 ..... 13, 46
Greenway vs. James, 34 Mo. 326 ..... 12, 16
Home Benefit Ass'n vs. Horne, 280 S. W. (Tex.) 226 ..... 13, 16, 49
King vs. Pillsbury, 115 Me. 528 13
Layne & Bowler Corp. vs. Western Well Works, 67 L. Ed. 712 12
Michigan Life Ins. Co. vs. Oliver, 256 Fed. 212, 63 L. Ed. 212 ..... 12, 14
Morrill vs. Palmer, 68 Vt. 1 ..... 13, 48
Newell on Libel and Slander (5th Ed.) p. 240 ..... 13, 43
Ostertag vs. Railroad, 261 Mo. 457 ..... 13, 48
Odgers on Libel and Slander (4th Ed.) p. 48, Sec. 2 13, 43
Patton vs. Fox, 169 Mo. 106 ..... 12, 16

Plannett vs. McFall, 284 S. W. 850 47
Railway Company vs. Erwin, 64 Tex. 535.... ....13, 52
Remus vs. U. S., 291 Fed. 501.... . .....13, 48
Southern Power Co. vs. N. C. Pub. Ser. Co., 68 L. Ed. 413 12
United States vs Hammond, 226 Fed. 849.....13, 41
United States vs. Johnston, 69 L. Ed. 925..... 12
United States vs. U. S. F. & G. Co., 236 Fed. 696..13, 42

No. 455.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

EDWARD H. JOHNSON, RESPONDENT.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

MYRTLE J. JOHNSON, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF CASE.

These are passenger carrier *res ipsa loquitur* cases. Plaintiffs had judgments in the trial court; the defendant did not make a motion for a new trial; did

not give the trial court an opportunity to pass upon alleged errors, but sued out writs of error, under which the amount of the verdicts could not be questioned.

The Circuit Court of Appeals for the Eighth Circuit on July 2nd, last, affirmed the judgments.

Under Rule 28 of the Circuit Court of Appeals, the defendant had sixty days in which to move for a rehearing. The defendant abstained from making such a motion and thus deprived that court of an opportunity to correct any alleged errors.

The Court of Appeals in an opinion by Judge Symes said:

> "3. Both counsel for the plaintiff who addressed the jury stated that the defense charged that:
>
> > 'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.'
>
> "And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We

therefore deem it proper to observe that this line of argument was likely to create (Fol. 481) prejudice, and did not aid the court or jury in the performance of their duties.

"The record containing no reversible errors, the judgment in each of the two cases is affirmed."

This Court granted writs of certiorari and ordered that:

"The argument is to be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial."

We understand the order limiting argument confines counsel to a discussion of the matter of syphilis mentioned in the opinion of the Circuit Court of Appeals.

Suffice it to say that the "Statement of the Case" prepared by the defendant is misleading and inaccurate. If the Court desires a complete and accurate "Statement of the Case" as to how the injuries were received we refer the Court to "Appendix A" of Brief of Respondents in Opposition to Writs of Certiorari.

Notwithstanding the order of this Court limiting argument, as aforesaid, the defendant has seen fit in its brief to disobey that order by calling this Court's attention to many matters of argument and other matters to which no objection of any kind was made at the trial (See defendant's Brief, pages 7, 8, 9, 10 and 11).

We submit that such extraneous argument is improper and should be disregarded.

Citations to Record Showing That Defense Was "Syphilis."

That the defendant in its cross examination of plaintiff and Imogene Johnson and all of plaintiff's doctors attempted to prove that Myrtle Johnson was suffering from syphilis, and that that was the cause of her paralysis, is easily demonstrated by a reading of the record. The attempt to prove that she was suffering from syphilis began with the very first witness, Imogene Johnson (page 155), and continued and persisted with many witnesses thereafter. The cross examination on this subject is too voluminous to quote in this brief. The most important parts will be found upon the following pages of the Record: 155, 156, 157, 173, 178, 180, 181, 184, 185, 188, 205, 282, 285, 324, 329, 330, 331, 332, 333, 335, 336, 338 and 339.

Beginning with Imogene Johnson counsel sought to show that Myrtle Johnson had an "eruption of the skin" (which is one of the symptoms of syphilis); "didn't it look a little bit as though it was a kind of pimple and yet it wouldn't come to a head" (p. 155), (a symptom of syphilis); defendant tried to get Imogene Johnson to say that Myrtle Johnson had "hypodermic injections" (p. 157), (ordinary treatment for syphilis); at page 173 plaintiff asked Dr. St. Elmo Sanders "has all the improvements that is to take place, taken place," and Mr. Marley objected because the question did not include "any tests of the blood that he made, now. There is a treatment here, iodide of potassium and all those elements ought to be taken into consideration in giving an opinion upon this point"

(iodide of potassium is a well recognized treatment for syphilis); at page 188 defendant again asked Dr. Sanders about his administration of iodide of potassium (attempting to show it was given for syphilis); and at page 180 defendant sought to prove by its cross examination of Dr. Sanders that "they some times took blood tests that show negative, when as a matter of fact there is a positive condition there" (the inference sought was that Myrtle Johnson had syphilis regardless of the negative test); and by the same cross examination on page 181 defendant attempted to prove that even though the syphilis was not in active form there was present a "*luetic condition,*" and that the proper thing for the doctor to have done was to have taken a spinal test and not have relied upon a blood test; in the cross examination of Dr. Richman (pp. 184-185) defendant sought to show that the Wassermann test was unreliable and that the plaintiff might have had syphilis regardless of the negative finding by the blood test and that even though there was a negative finding she still might have a "luetic condition" of syphilis, and that when the syphilis "gets down into the nerves, and the tissues" a lumbar test should be made (p. 185); and that if the attending doctor "*had a suspicion in his mind that the* **plaintiff** *was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?*" (p. 185); (later examination shows that defendant contended that neurosyphilis was that stage of syphilis in which the disease germ "*spirochaeta pallida,*" became active in the nerves and their sheaths); in the cross ex-

amination of Dr. Bahr (p. 188) the defendant sought to prove the same thing, and that the attending physicians ignorantly or negligently failed to make a spinal column test, the inference being perfectly plain that the defendant was contending that Myrtle Johnson had syphilis which fact could have been proven if a lumbar test had been made; in the examination of Dr. St. Elmo Sanders at page 192, the subject of "locomotor ataxia" was discussed when defendant's counsel said: "I don't believe there is a question of locomotor ataxia in this case at all,' and then Mr. Wickersham said: "If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question." And then Mr. Marley said: "I am saying now there was nothing said about locomotor ataxia, and he's going into something that isn't within the range of the testimony as developed at this time * * *." Upon objection being sustained, Mr. Wickersham said: "The idea was, Your Honor, that the evidence about the blood tests—*I want to go into it if there was any question about it.*" (It will be noted that Mr. Marley was merely claiming there was no evidence of locomotor ataxia, but was claiming, nevertheless, that Myrtle Johnson had neurosyphilis (secondary stage) and not locomotor ataxia, which is a symptom of the tertiary stage); at page 205 when certain X-ray pictures had been identified and offered in evidence, Mr. Marley objected to their reception, "Because it would embody any mistakes they made in the diagnosis of her case." (Mr. Marley was still hammering at "syphilis" before the jury); in the cross examination of Myrtle Johnson, page 282, defendant

tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvorsan" (a treatment for syphilis); and again at page 285 counsel tried to bring out that the internal medicine administered was "bismuth," and at page 286 that "hypodermic injections" were administered; in the examination of Dr. Geraughty at pages 323, 324, the doctor had testified that plaintiff's skin was "perfectly clear, no existence of eruption" and he was then asked about the "bony condition" and he answered: "In syphilis the bones of the body seem to be affected very prominently, pains in the bones, especially in the shin bones, it has been very characteristic in the chronic cases," thereupon Mr. Marley said:

"We object to that because there is no evidence of a chronic case."

And Mr. Wickersham said:

"Let the record show that he doesn't claim that."

Then Mr. Marley said:

"The chronic case would be in the tertiary state."

Plaintiff was attempting to show that syphilis did not exist in any stage, either first, second or third, and when the doctor stated that pains in the bones were characteristic in the chronic cases, meaning third stage, Mr. Marley objected because there was no evidence that the disease in this case was in the third stage, but would make no admission that it did not exist in the first or second stages; that it is plain, beyond dispute, that the defendant was claiming that the plaintiff was suffering from syphilis in the second stage, that is, after the first stage when the syphilis germ "gets down into

the nerves and the tissues" (p. 184); that defendant was claiming that she was suffering from syphilis in the second stage is clearly evident from the defendant's cross examination of Dr. Geraughty and particularly at page 331 where the following occurs:

> "A. As a rule the secondary state, secondary symptoms is the skin."
> "Q. This germ is what is called the spirochaeta?"
> "A. Yes, sir."
> "Q. *Spirochaeta pallida*, that is the full name, the first test they use is what is called the Wassermann test of the blood to find out that condition?"
> "A. Yes, sir. Wassermann test is used."
> "Q. After it gets beyond that stage and gets in the stage of neurosyphilis, the blood test is not accurate."

(The defendant was contending that the taking of the Wassermann test and the giving of iodide of potassium, and the general conditions demonstrated that the plaintiff had syphilis and that being in the second stage of syphilis, to-wit, neurosyphilis, the blood test which was given was not accurate and that the defendant could rightfully contend that she had syphilis in the second stage.)

Defendant evidently tried to show in the cross examination of Dr. Geraughty (p. 332) that the doctor "became suspicious of locomotor ataxia"; and on the same page attempted to show by the doctor that "*lesions in what is called neurosyphilis*" "*come along in the tissues and form along in the nerves what is called gummatous formations*" and "*tubercules*" that "*press on the nerves, the tissues that is next to it*" and *keeps on increasing until it presses down and paralysis is*

the result" and that such pressure "is along the arachnoid membrane" which "is between the dura mater and the pia mater" and that "it also gets in the meninges" which "covers the brain, the spinal cord and everything" and "*after that is done, don't it begin to form there so as to paralyze one side of the body and by pressure cause what you call occlusion*" (p. 333) and "*presses down, and isn't there a formation there what you doctors call a thrombosis formation*" (*here was a definite attempt by counsel for defendant to prove that the paralysis in question was due to syphilis and not to traumatism*); at page 335 defendant's counsel again sought to prove syphilis and asked Dr. Geraughty, on cross examination:

> **By Mr. Marley**: "Now isn't it a fact, Dr. Geraughty, that in neurosyphilis that it is slow and insidious, it is true, but it sometimes reaches a state that even a slight shock will bring on the paralytic stroke, hemiplegia, as you call it?"

The doctor answered:

> "A. Yes, occasionally. Occasionally a case can come quick under those circumstances."
> Mr. Marley: "That is all."

The defendant's counsel was evidently satisfied with this answer and said "That is all"; thereupon the following re-direct examination was had:

> By Mr. Wickersham: "Q. Explain that situation as far as the evidence in this case is concerned?"
> "A. The evidence in this case, of course, points away from that. Had this patient shown symptoms and given other evidence of having had an old

syphilis and then had an injury, then it is possible that a quick paralysis might have occurred with previous history, if the patient had been worked up to the point where—could have been worked up to that point, but with the history showing the traumatic condition, the evidence points to traumatic hemiplegia rather than neurosyphilis."

"Q. AND IF SHE HAD HAD SUCH A NEUROSYPHILIS AS COUNSEL INDICATES, IT WOULD HAVE BEEN NATURAL AND REASONABLE THAT YOU WOULD HAVE HAD SOME EVIDENCE OF IT FROM THE GLANDS?" (336).

"A. Yes."

The last quoted question ("AND IF SHE HAD HAD SUCH A NEUROSYPHILIS AS COUNSEL INDICATES") is a positive statement to opposing counsel, to court and jury that the defense was neurosyphilis; yet the defendant in no manner disclaimed that such was a fact; the plaintiff and the court had a perfect right to assume that such was the defense.

At page 338 defendant on cross examination of Dr. Hines said: "Doctor, did she tell you that she had a Wassermann test and that it showed positive?" (an effort to prove syphilis). On cross examination of Dr. Mella, page 339, defendant's counsel asked: "But doctor, you didn't make any examination as to a blood condition at all" (defendant again directs the jury's attention to syphilis); on the cross examination of Dr. Krall, page 356, defendant again tried to show that plaintiff admitted that the Wassermann test showed positive, and at page 357, attempted to show the administration of bismuth.

The cross examination by defendant of plaintiff, and Imogene Johnson and all seven doctors furnishes abundant evidence that defendant was attempting to prove that plaintiff had syphilis and when Mr. Chilcott in his argument charged: "That is the defense in this case, that she had the syphilis" Mr. Marley merely said: "I object to that, Your Honor, there is no evidence of that at all, it isn't proper argument." Can there be any question as to the propriety of the Court's ruling that "The objection is overruled, in view of the examination of the witnesses, and of the testimony in the case?" The sole objection was: "There is no evidence of that at all." The record is full of evidence that such was the defense. It was clearly established that that was the defense.

BRIEF.

The Writs of Certiorari should be dismissed and the judgments affirmed for the following reasons:

1. These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."

Layne & Bowler, Corp. Petitioners v. *Western Well Works, et al.*, 67 L. Ed. 712.

Federal Trade Commission, petitioner, v. *American Tobacco Co.*, 71 L. Ed. 1193.

United States of America, petitioner, v. *James J. Johnston*, 69 L. Ed. 925.

Southern Power Co. v. *North Carolina Public Ser. Co. et al.*, 68 L. Ed. 413.

2. It has been the practice of this Court not to grant writs of certiorari for alleged improper argument even though Circuit Court of Appeals holds the argument improper and yet affirms the judgment.

Michigan Mutual Life Ins. Co. v. *Oliver*, 256 Fed. 212.

Writ of certiorari denied June 9th, 1919, 63 L. Ed. 1187.

3. The language employed by Judge Symes in the opinion of the Circuit Court of Appeals was unfortunate, and in our judgment, does not accurately express the judgment of the court.

See R. 155, 156, 157, 173, 178, 180, 181, 184, 185, 188, 205, 282, 285, 324, 327, 330, 331, 332, 333, 335, 336, 338, 339, 420.

Bliss on Code Pleading, Sec. 329.

Ford v. *Kansas City*, 181 Mo. 137.

Greenway v. *James*, 34 Mo. 326.

Patton v. *Fox*, 169 Mo. 106.

4. The argument complained of was proper. The record shows conclusively that the defendant attempted to prove "Syphilis" as a defense even though it put no witness on the stand to prove it; defendant did not object to argument that defense was syphilis, but limited its objection to argument that syphilis would bar plaintiff from society and implied indecency; the exceptions were inadequate; the limits of argument were within the sound discretion of the trial court and there was no abuse of discretion. The argument was not prejudicial to defendant.

United States v. *Hammond*, 226 Fed. 849.
Buesker v. *Moore*, 174 Fed. 368.
A. T. & S. F. Ry. Co. v. *Nichols*, 2 Fed. (2nd) 12.
United States v. *U. S. F. & G. Co.* 236 Fed. 696.
Odgers on Libel and Slander (4th Ed.) p. 48, Sec. 2.
Newell on Libel and Slander (3rd Ed.) p. 240.
Golderman v. *Stearns*, 7 Gray, 181.
King v. *Pillsbury*, 115 Me. 528.
Grand Trunk Ry. Co. v. *Blay*, 297 Fed. 605.
Brady v. *Traction Co.*, 140 Mo. App. 421.
Remus v. *U. S.*, 291 Fed. 501.
Ostertag v. *Railroad*, 261 Mo. 457.
Morrill v. *Palmer*, 68 Vt. 1.
Home Benefit Ass'n v. *Horne*, 290 S. W. (Tex.) 226.
I. & G. Ry. Co. v. *Ervin*, 64 Tex. 535.

ARGUMENT.

1. These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."

We recognize that this Court has the power and right to have these cases certified, but we respectfully submit that the limits of argument by counsel can, in an ordinary negligence case, as this, safely be left to the sound discretion of the trial Court subject to review by the Circuit Court of Appeals. This Court has earned the commendation of the American Bar for its effort to limit its jurisdiction and the number of appeals and writs to be heard by this Court, but we submit that the sustaining of these writs will be an encouragement to counsel in many cases to file similar petitions and thus a part of the good work already done by this Court will be undone.

This is a purely private controversy. The matter involved is of no importance to the public. The principle of law involved is fundamental and is known to all practitioners. All that is here involved is the application of the principle to the facts of this case.

2. It has been the practice of this Court not to grant writs of certiorari for alleged improper argument even though the Circuit Court of Appeals holds the argument improper and yet affirms the judgment.

The case of *Michigan Mutual Life Ins. Co. v. Oliver*, 256 Fed. 212, was a suit to collect insurance for death; the defense was suicide; the plaintiff's attorney in

argument to the jury went *outside the record* and charged that the defendant removed the case to the Federal Court in order to get away from "Conecuh County where the public knew the facts of this case." The trial court upon objection ruled the argument proper; the Court of Appeals (Fifth Circuit) held the argument improper but affirmed the judgment, exactly what was done in the cases at bar. This Court on June 9th, 1919, 63 L. Ed. 1187, denied a writ of certiorari therein.

3. The language employed by Judge Symes in the opinion of the Circuit Court of Appeals was unfortunate, and in our judgment, does not accurately express the judgment of the court.

It is a very unpleasant task to criticise an opinion of a Court that has decided a case in our favor, but it becomes necessary in this instance. However distasteful the task may be, we feel it our duty to frankly discuss Judge Symes' opinion.

Judge Symes said: "*We find no justification for this assumption*" to wit, that the defense in the case was syphilis.

We submit that Judge Symes was clearly in error in this conclusion. The record conclusively establishes that syphilis was a defense as we will point out under Point 4 herein.

Judge Symes further said: "*An affirmative defense of this character cannot ordinarily be proved by cross examination.*"

We respectfully submit that this statement is erroneous. "Contributory negligence," and "Assump-

tion of risk," for instance, are affirmative defenses; they are proved every day *solely by cross examination.*

> "In an action for negligence, by which property or the person is injured, the fact that the injury results from the negligence of the defendant, is put in issue by a general, denial, and, hence, he may show affirmatively, under such denial, that the injury arose from some other cause."
> Bliss on Code Pleading, Sec. 329.

> "Under a general denial defendant may prove any fact which goes to show that plaintiff never had a cause of action against him."
> *Greenway* v. *James*, 34 Mo. 326.
> *Patton* v. *Fox*, 169 Mo. 106.

It is difficult to understand just exactly what Judge Symes meant in the use of the phrase "affirmative defense." An "affirmative defense" ordinarily is one that must be specially pleaded. It may be that Judge Symes inadvertently assumed that it was necessary to plead "syphilis" as a defense before the defendant could rely thereon. If he did, then such erroneous conception of the law explains his language. That it is not necessary to specially plead "syphilis" as a defense is fundamental law. Under a general denial the defendant may establish by testimony of its own or by cross examination of plaintiff's witnesses any fact which goes to show that plaintiff never had a cause of action against the defendant or any fact that minimizes the damages.

In the case of *Home Benefit Association* v. *Horne*, 280 S. W. 226, the defense of syphilis was attempted to be established solely by cross examination, as will be shown later in this brief.

It should be borne in mind that the defendant had not had the plaintiff examined by a physician prior to the trial and no blood test had been made by the defendant, hence the defendant was compelled to rely upon cross examination to establish *such defense* or any foundation therefor.

Judge Symes further said: "*Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination.*"

We respectfully take issue with that statement. The issue of syphilis was first injected into the case by defendant's cross examination of Imogene Johnson at pages 155, 156 and 157; the defendant's objection to a question asked Dr. St. Elmo Sanders on page 173, revealed defendant's contention, and defendant's cross examination of Dr. St. Elmo Sanders on pages 178 and 181 showed its purpose; *the first time that the word "syphilis" was mentioned at the trial was during the cross examination of Dr. St. Elmo Sanders by the defendant at page* 181; it was there that the defendant first suggested that even though the syphilis might not exist in an "active form" it could exist in a "luetic condition that is not active;" **the plaintiff up to this time had not in any manner mentioned the word "syphilis" or anything concerning it**; Dr. Sanders was then temporarily excused from the stand and Dr. Richman was put upon the stand and the defendant sought to prove by the cross examination of Dr. Richman that a Wassermann test that was taken, and which showed negative was unreliable and that even though the test showed

negative there could still be a luetic condition of syphilis (p. 184) and then counsel for defendant sought further to show that the test that was taken was wholly unreliable because it was a mere blood test, and that a competent physician should have taken "the test of the fluid in the spinal column" (R. 185) the Doctor answering, "The doctor, to be thorough, I believe should do that." The defendant then asked Dr. Richman:

> "Q. Yes. In other words, if he had a suspicion in his mind that the PLAINTIFF WAS SUFFERING FROM NEUROSYPHILIS, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he (R. 185)?"

Here is a definite attempt upon the part of the defendant to prove that the *plaintiff* was suffering from neurosyphilis (syphilis in the secondary stage) and that Dr. Sanders was negligent in merely taking a blood test and that he should have taken lumbar test.

Many other pages of the record show not only that the defendant injected the issue of syphilis into the case, but continued throughout the trial in an attempt to establish that defense. We, therefore, strongly take issue with the statement of Judge Symes that the defendant's interrogatories were but a continuation of similar questions propounded by the plaintiff.

Judge Symes said:

> "Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination."

The author of that sentence seems to indicate that if plaintiff showed affirmatively that she did not have syphilis that the defendant was thereby precluded from trying to prove that she did have syphilis.

Suppose plaintiff's counsel in an ordinary negligence case asked plaintiff if he was careful not to get hurt at the time of the accident, could not the defendant then on cross examination prove that plaintiff was contributorily negligent?

If it could be said that "defendant's interrogatories along this line were no more than a continuation of similar questions propounded on direct examination" then we ask, what was the purpose of defendant's interrogatories along this line, except to prove that plaintiff did have syphilis?

Suppose under this evidence the jury had returned a verdict for only $100 for a woman who is admittedly a hopeless paralytic, and the plaintiff had moved for a new trial on the ground of inadequate damages, would not the defendant have attempted to sustain the verdict by arguing that the jury must have found that the plaintiff had syphilis and that such disease was the cause of her permanent disability?

But notwithstanding these inaccuracies of statement and expression by Judge Symes, the Court of Appeals held that there was no reversible error, that is to say, the trial court did not abuse its discretion in the premises.

4. The argument complained of was proper; the record shows conclusively that the defendant attempted to prove "syphilis" as a defense even though it put no witness on the stand to prove it; defendant did not object to argument that defense was syphilis, but limited its objection to argument that syphilis could bar plaintiff from society and implied indecency; the exceptions were inadequate; the limits of argument were within the sound discretion of the trial court and there was no abuse of discretion; the argument was not prejudicial to defendant.

(a) *Plaintiff's knowledge that defense would be "syphilis."*

It is evident that the plaintiff's attorneys knew before the trial that the defendant would probably raise the defense of syphilis.

The record, page 191, shows that the plaintiff asked Dr. St. Elmo Sanders the following question:

> "Q. Now, Doctor, did some doctor representing himself as an agent of this railroad company come to you some weeks ago and talk to you about any syphilis trouble of this woman?"

That question was objected to and the answer excluded.

Mr. Chilcott, in his opening statement, page 91, to the jury said:

> "Now, gentlemen, we don't know what the defense in this case is going to be. We have heard rumors, but this girl was a strong, healthy, able-bodied girl before she was injured, etc."

Mr. Wickersham in his closing argument to the jury, page 426 said:

> "You note that Mr. Chilcott said in his opening statement, 'I only know from rumor what the

> defense in this case may be, but we will be able to meet it.' "

It is evident that we knew before the trial that the defendant was going to interpose the defense of syphilis. And it is also evident from the cross examination of practically every one of plaintiff's witnesses that the defendant was trying to prove syphilis. Should we have met that defense promptly upon re-direct examination, or should we have waited until the poison of such a defense had been injected into the minds of the jury and then have met such defense upon rebuttal? Our experience as trial lawyers teaches us that once the minds of the jurors are poisoned by such a defense, it is most difficult to meet such defense at the end of the case. Good trial practice required that such defense be met promptly by re-direct examination, and that is exactly what we did.

(b) *The defense was "syphilis."*

There are three stages of syphilis, "primary, secondary and tertiary" (330).

Defendant charged plaintiff had syphilis in the secondary stage, to-wit, *neurosyphilis*, that is the stage when the germ "*spirochaeta pallida*" "gets down into the nerves and tissues" (184); "secondary symptoms is the skin" (331).

The Standard work of White and Martin on "Genito Urinary and Venereal Diseases" (6th Ed. p. 854), says in discussing syphilitic eruptions of the skin:

> "Thus the syphilides (eruptions of the skin) of the first period of secondary syphilis are due

> to a local hyperaemia and slight cell-infiltrate, affecting only the epidermic and papillary layers of the skin and producing * * * *papular* lesions."

"Papular" is defined by Webster's International Dictionary as "having papules or *pimples.*" It also defines "*luetic*" as "Med. Specif. affected with syphilis."

White and Martin, *supra*, page 908, in discussing "*syphilis of the nervous system*" says:

> "Syphilis, then may attack the brain in the form of:
>
> "1. Diffuse *gummatous* infiltration of the *meninges*, with extension of the brain substance.
>
> "2. *Gummata*, or circumscribed tumors.
>
> "3. Endarteritis, with its concomitant brain-lesions."

And at page 916:

> "The *paralysis* that develops during sleep is probably due to a *thrombus;* that occurring during brain activity is probably caused by rupture."

And at page 617:

> "The treatment for cerebral syphilis is * * * a mixture of *potassium iodide and mercury.*"

And at page 617:

> "When rapid action of the specific is imperative, *hypodermic injections* of mercury are indicated."

And at page 905:

> "*Gummata* are formed with far less frequency in the cerebral tissue proper than in the bones of the skull, or in the *meninges* or the *subarachnoid space.*"

And at page 905:

> "It is extremely difficult to distinguish a large *tubercle* of the brain from *gumma*. The symptoms will be the same." (Italics ours.)

With the above quotations from a Standard work on syphilis we proceed to demonstrate that defendant attempted to prove that plaintiff was suffering from *neurosyphilis*, that is, syphilis in the secondary stage.

Mark the phrases: "*syphilis*," "*primary*," "*secondary*," "*tertiary*," "*neurosyphilis*," "*spirochaeta pallida*," "*secondary symptoms*," "*eruptions of the skin*," "*syphilides*," "*pimples*," "*lesions*," "*syphilis of the nervous system*," "*gummatous*," "*gumma*," "*paralysis*," "*thrombosis*," "*embolus*," "*meninges*," "*arachnoid*," "*hypodermic injections*," "*mercury*," "*iodide of potassium*," "*salivation*," "*lactic*," "*tubercle*," "*lumbar spinal puncture*," *hemiplegia*," etc.; all these words and phrases were used by defendant's counsel in a vigorous and persistent effort to establish the defense of syphilis.

The first witness on the stand was Imogene Johnson; the plaintiff did not ask her one single question concerning syphilis or anything relating to it; nevertheless the defendant immediately sought by cross examination to show syphilis by asking her if the plaintiff had "any eruption of the skin at all" (155) and "*don't it look a little bit as though it was a kind of a pimple and yet it wouldn't come to a head?*" (156) and "didn't she ever tell you whether they gave her *hypodermic injections?*" (157) (it will be noted that one of the symptoms of syphilis is an eruption of the skin during the first period

of secondary syphilis "producing papular lesions," that is, *pimples that do not come to a head*, and that "hypodermic injections" are recommended as a treatment for syphilis).

The next witness was Dr. St. Elmo Sanders. A careful reading of his direct examination will demonstrate that the plaintiff did not ask him anything concerning syphilis or the condition of plaintiff's blood; we put a hypothetical question to the doctor asking him whether the blow and violence indicated in the question could cause "the results to which you have testified" (167). Thereupon Mr. Marley objected to the question, saying among other things:

> "In other words to make my point clear, the evidence might indicate, by his examination and from his knowledge of it, that—and from the treatment he was giving of iodide of potassium—that there was another cause or condition in there that should be taken into consideration."

Bear in mind at that time only a portion of the hospital records had been put in evidence, including plaintiff's exhibit 4K, 175-176, which merely contained the words "Pot. Iodide, Sat. Sol. Physicians directions: Sig. gtts. V every 3 hrs. in full glass of water." Mr. Marley, anxious to lay a foundation for the syphilis defense, read that portion into the record, page 164. The plaintiff had not asked one single question concerning such treatment. It is evident that the above quoted objection of defendant was interposed for the purpose of showing that iodide of potassium was actually given for the treatment of syphilis. Toward the close of his direct examination the plaintiff asked the doctor:

"Q. * * * Now then doctor, in your opinion has all the improvement that is to take place, taken place?"

Thereupon the defendant objected to the question as follows:

"Mr. Marley: * * * I believe that his opinion should be based upon his exact examination of her, including any tests of the blood that he made, now. *There is a treatment here iodide of potassium* and all those elements ought to be taken into consideration in giving an opinion upon this point" (173).

Again defendant is attempting to inject this defense into the case. The record on page 178 of the cross examination of this doctor shows that defendant was attempting to show that the doctor did not prescribe iodide of potassium for the purpose of absorbing the clot or exudate on the brain caused by the blow, but was in fact prescribing that medicine to treat a syphilitic condition as will be shown later. Upon later cross examination of Dr. Sanders the defendant interrogated the doctor about Wassermann tests (p. 180) and brought out for the first time that tests are not only taken from the blood, but from "the spinal cord in the lumbar region" (180) and the defendant asked the doctor:

"Q. Isn't it very frequently the case that when you take a blood test from the arm that it might show negative when if you took it from the lumbar region of the spinal cord it would show positive?" (180).

Bear in mind that the hospital record concerning the blood test had not at that time been put in evidence and the plaintiff had not asked the doctor what the condition

of plaintiff's blood was. During this cross examination the defendant diligently sought to establish its contention that blood tests are inaccurate and that spinal puncture tests ought to have been made. Having secured from the doctor a statement that "sometimes you get a positive test from the lumbar region when the blood test shows negative," the defendant was "hot on the scent" and injected the word "syphilis" into the record for the first time by anybody. The doctor had said on cross-examination, page 181, that Wassermann tests in his opinion were reliable tests for certain things, and then the defendant asked:

> "Q. What are those certain things, Doctor?
> A. The test whether there is syphilis or not in an active form.
> Q. Whether or not there is syphilis in an active form; but supposing there is not in an active form, *a luetic condition that is not active*, then what?"

Here the defendant also brings out for the first time that a luetic or inactive condition of syphilis could exist and that with such luetic condition existing the proper thing for a doctor to do was to "go into the spinal column."

If the defendant was not trying to show that the plaintiff was suffering from syphilis what was the purpose of all these questions?

Dr. Sanders was excused from the stand and Dr. Richman was put upon the stand and after a brief direct examination was cross examined by the defendant, during which the defendant sought to show that Wasserman tests of the blood were unreliable (184) and defendant asked him:

"Q. In other words, it could show negatively when as a matter of fact there was a luetic condition?
A. It could be negative with a luetic condition, yes."

and

"Q. I know. Now, then, where you have a case that shows nervous symptoms you would take the test of the fluid in the spinal column, wouldn't you?
A. The doctor, to be thorough, I believe should do that.
Q. Yes. In other words, if he had a suspicion in his mind, that the PLAINTIFF was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?"

and

"Q. Yes, to make a thorough test as to neurosyphilis there should be a test taken of the spinal column, shouldn't there?"

When the defendant asked Dr. Richman if the doctor "had a suspicion in his mind that the *plaintiff was suffering from neurosyphilis*" he should take a lumbar test, the defendant was attempting to show that the plaintiff did have neurosyphilis. That was the first time "neurosyphilis" had been used in the trial. If the defendant was not trying to show that the plaintiff was suffering from neurosyphilis, why was the defendant contending that the blood test was unreliable and that a lumbar test should have been made? Why was the defendant suggesting that a lumbar test of the PLAINTIFF should have been made?

In the cross examination of the next witness, Dr. Rahr, defendant again claimed a lumbar test should have been made and asked the doctor:

"Q. Doesn't that—Haven't you found that that would sometimes report positive when the blood test would report negative?" (188).

Dr. Sanders was recalled to the stand and when the plaintiff asked him to differentiate the plaintiff's manner of walking from locomotor ataxia. The defendant objected, saying:

"Mr. Marley: If the court please, I don't believe there is a question of locomotor ataxia in this case at all, *so far as the evidence is concerned so far*, and I object to going into it.

"Mr. Wickersham: If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question.

"Mr. Marley: I am saying now there was nothing said about locomotor ataxia, *and he is going into something that isn't within the range of the testimony as developed at this time;* and we object to it as incompetent; too remote.

"The Court: Objection sustained.

"Mr. Wickersham: The idea was, Your Honor, that this evidence about the blood test—*I wanted to go into it if there is any question about it.* That is all. You may examine" (192).

It will be noted that Mr. Marley merely objected to a discussion of locomotor ataxia because that "isn't within the range of the testimony at this time" (192). In other words he was claiming that the plaintiff was suffering from neurosyphilis, syphilis in the secondary stage, locomotor ataxia being a development of the tertiary stage.

In the cross examination of Dr. Chaney, page 205, the defendant objected to the doctor testifying as to his reading of certain X ray plates which showed a

thickening that caused a pressure upon the brain, resulting from the injury, "because it would embody any mistakes they made in the diagnosis of her case" (205). Again the defendant was contending that the diagnosis "*edema of the brain resulting from injury*" was wrong and that the plaintiff was suffering from neurosyphilis and not from traumatism.

During the cross examination of the plaintiff, Myrtle Johnson, page 282, defendant tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvarsan" (a treatment for syphilis), and again at page 285 counsel tried to bring out that the internal medicine administered was "bismuth," and at page 286 that "hypodermic injections" were administered.

On the direct examination of Dr. Geraughty, the doctor was asked:

> "Q. You spoke about bony condition; what did you mean by that?
> A. In syphilis, the bones of the body seem to be affected very prominently, pains in the bone, especially in the shin bone. It has been very characteristic in the chronic cases."

Thereupon the defendant objected:

> "Mr. Marley: We object to that because there is *no evidence of a chronic case*.
> "Mr. Wickersham: Let the record show that he doesn't claim that.
> "Mr. Marley: The chronic case would be in the tertiary state" (323-324).

The plaintiff was here attempting to show that syphilis did not exist in any stage, either first, second

or third, and it is evident from reading the defendant's objection that the defendant was admitting that plaintiff did not have syphilis in the tertiary stage, but was still contending that the syphilis existed in the secondary stage, to-wit, neurosyphilis.

That defendant was claiming that the plaintiff was suffering from syphilis in the secondary stage is clearly evident from the defendant's cross examination of Dr. Geraughty:

> "Q. When a patient is given iodide potassium, so many drops every few hours, what is that ordinarily for, what kind of a disease? (Remember that at page 164 the defendant had read into the record the fact that Dr. Sanders had prescribed 5 drops of potassium iodide every three hours).
> A. We use that, it is one of the major drugs in the treatment of syphilis.
> Q. And before they discovered the salvarsan, it is or was the principal medicine in the treatment of syphilis?
> A. Yes, sir, very prominent, and still is" (329).

and

> "Q. There are three stages of syphilis, are they not?
> A. Generally considered.
> Q. Called the primary, secondary and tertiary?
> A. Yes, sir."

and

> "Q. And very frequently ladies may acquire it by drinking out of cups, or kissing people that might have a *chancre* on the lips?
> A. Yes, sir.
> Q. And it is very common to acquire it that way?
> A. I wouldn't say common.
> Q. But frequent?
> A. Yes, sir; frequent.

Q. And many a woman goes along suffering from syphilis and knows nothing about it?
A. Men also, yes, sir." (330).

Here is an adroit attempt on the part of the defendant to induce the jury to believe that the plaintiff was suffering from neurosyphilis and acquired that disease innocently without immorality.

And

"A. As a rule the secondary state, secondary symptoms is the skin.
Q. This germ is what is called *spirochaeta?*
A. Yes, sir.
Q. *Spirochaeta pallida?* That is the full name. The first test they use is what is called the Wassermann test of the blood to find out that condition?
A. Yes, sir, Wassermann test is used.
Q. After it goes beyond that stage, and gets into the stage of neurosyphilis, the blood test is not accurate?
A. The blood test is not absolutely accurate in any stage of it.
Q. Now, however, where there is neurosyphilis, to make a sure test of it, don't they generally make a test of the fluid of the spinal cord taken from the lumbar region" (331)?

And

"Q. Now, taking up the question of lesions in what is called neurosyphilis, doctor, doesn't it form along in the tissue and along the nerves what is called *gummatous formations?*
A. Yes, sir.
Q. And they are *tubercules*, are they?
A. Yes, sir.
Q. And they press on the nerve, the tissue that is next to it?
A. Yes, sir.

Q. And it keeps on increasing until it presses down and *paralysis* is the result, isn't that right?
A. Yes, sir.
Q. It is generally between, it is along the *arachnoid* membrane?
A. Yes, sir.
Q. And that is between the dura mater and the pia mater?
A. Yes, sir.
Q. And it also gets in the *meninges?*
A. Yes, sir.
Q. That is what covers the brain the spinal cord and everything?
A. Yes, sir; outside coating.
Q. *After that is done, doesn't it begin to form there so as to paralyze one side of the body and by pressure cause what you call occlusion?*
A. Yes, sir.
Q. And presses down, and isn't there a formation what you doctors call there a *thrombosis* formation?
A. I wouldn't say *thrombosis* in that case; it is a foreign body carried around and deposited in the end of an artery. *Thrombosis* is the blocking of any foreign substance in the blood.
Q. Isn't that *embolus?*
A. Both very close together. *Thrombosis* is an *embolus* that has stopped" (332-333).

And,

"Q. **Now isn't it a fact, Dr. Geraughty, that in neurosyphilis, it is slow and insiduous, it is true, but it sometimes reaches a state that even a slight shock will bring on the paraletic stroke, hemiplegia, as you call it?**
A. Yes occasionally. Occasionally a case can come quick under those circumstances" (335-336).

Here is a definite proof that the defendant was attempting to make it plain to the jury that the plaintiff had neurosyphilis; that she had acquired the disease

innocently without immorality; that the Wassermann test which was made was wholly unreliable, and that a lumbar test should have been made, and that the plaintiff having neurosyphilis, and not knowing it, the "slight shock" which she received at the time of the accident brought on the paralysis. If that was not the purpose of the defendant in eliciting this testimony, then what purpose had the defendant in mind?

Immediately after this cross examination of Dr. Geraughty the plaintiff asked the doctor on re-direct examination the following question concerning a "slight shock" causing paralysis so far as the plaintiff was concerned:

> "Q. Explain that situation as far as the evidence in this case is concerned?
> A. The evidence in this case, of course, points away from that. Had this patient shown symptoms and given other evidence of have had an old syphilis and then had an injury, then it is possible that a quick paralysis might have occurred with previous history, if the patient had been worked up to the point where—could have been worked up to that point, but with the history showing the traumatic condition, the evidence points to traumatic hemiplegia rather than neurosyphilis.
> **Q. And if she had had such a neurosyphilis as counsel indicates, it would have been natural and reasonable that you would have had some evidence of it from the glands?**
> A. Yes.
> Q. Some evidence from the bones?
> A. Yes, in a general way; some evidence of syphilis would have been present, of course, the neurosyphilis is a type of syphilis which includes the nerves of the central nervous system.
> Q. And if there was anything, any neurosyphilis that was the cause of the paralysis coming into

quick action from the blow, would you have any reflex in the woman today?

A. We would have a slow reflex.

Q. And the fact is she—the fact that she had exaggerated reflex there today be any evidence—

Mr. Marley: Object to leading the witness.

The Court: That has all been gone over" (336).

The question "**and if she had had such a neurosyphilis as counsel indicates**" is a positive declaration to counsel, court and jury that defendant was claiming plaintiff, before the accident, had neurosyphilis; yet defendant's counsel hearing that question acquiesced in it and made no denial that such was the defense, and did not interrogate the doctor further.

When plaintiff's counsel openly stated in substance in that question that the defendant was claiming that plaintiff had neurosyphilis, it was defendant's counsel's duty then and there to have denied such charge if the defense was not syphilis. Fairness to plaintiff, court and jury, then demanded that defendant's counsel deny such charge if it was not true. *Defendant ought not to be allowed to sit mute under such a situation and get all the benefit that might come in the form of a favorable verdict from such a defense and then if the verdict is against it assign such a charge as error. There is no justice in that.*

But defendant did not quit its attempt to prove neurosyphilis after Dr. Geraughty left the stand, but continued. It asked Dr. Hines on cross examination:

"Q. Doctor did she tell you that she had a Wassermann test and that it showed positive?

A. No, sir" (338).

The defendant inquired of Dr. Mella if he had made any examination of the blood condition (339).

In the cross examination of Dr. Krall defendant asked:

> "Q. Didn't she tell you they were positive?
> A. No, sir. She said they were negative" (356).

And,

> "Q. Did you give her any bismuth at all?
> A. At no time" (357).

Let us analyze for a moment that portion of defendant counsel's closing argument where he says:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never said she did have" (420).

Let us take the first two sentences. Are they true? If counsel is there referring to defendant's opening statement, the two sentences are true, but when applied to the examination of witnesses the sentences are not true, because counsel during the entire case diligently and relentlessly tried to prove plaintiff had a specific trouble, to-wit, neurosyphilis.

Now take the second sentence:

"I said nervous exhaustion, didn't I?"

What did counsel for defendant mean by "nervous exhaustion." "Nervous exhaustion" has two meanings. To the layman it probably means a "run-down" nervous condition, an exhausted or lowered nerve tone,

a tired nervous condition; to the doctor the term implies a definite disease; to the doctor it is a technical medical term known as Beard's Disease.

First let us assume that counsel for the defendant used the term "nervous exhaustion" as generally understood by laymen. If the defendant should claim that "nervous exhaustion" was intended to mean mere nervousness or a lowered tone of the nervous system, then we ask how could such lowered tone or "run-down" nervous condition put the syphilitic germ into the blood? If that is what defendant meant, why did defendant so strenuously insist that Wassermann tests were unreliable and that spinal puncture tests should have been taken? Why did defendant prove that syphilis may be contracted without immorality? Why did defendant prove that even though a Wassermann test showed negative yet a luetic condition of syphilis could be present? Why did defendant prove that if a person is suffering from neurosyphilis a "slight shock" might cause paralysis? Why all this proof, and much more, if defendant was not charging that plaintiff had syphilis?

"Nervous exhaustion" is a result and symptom of syphilis in the secondary stage—exactly the stage charged by the defendant.

Now let us consider the other meaning of the term. Throughout the trial defendant's counsel employed many technical medical terms and showed a profound knowledge of neurosyphilis and its symptoms and causes. He used so many technical terms it is fair to assume that he knew "nervous exhaustion" was a technical medical term.

"Nervous exhaustion" is commonly known as "Beard's Disease." Dana in his standard work "Text Book of Nervous Diseases and Psychiatry" 7th Ed. Ch. XXIV, page 577, in discussing "nervous exhaustion, Beard's Disease" says:

> "It may also be induced by the infection of syphilis. It then comes on in the secondary or less often in the tertiary stage."

"Nervous exhaustion" does not cause neurosyphilis. The germ "spirochaeta pallida" causes neurosyphilis when the germ "gets down into the nerves and tissues" and that causes "nervous exhaustion." NERVOUS EXHAUSTION IS BUT A SYMPTOM OF SYPHILIS. When defendant said that the plaintiff was suffering from "nervous exhaustion" it meant that kind of nervous exhaustion that was caused by syphilis. Thus we see that the use of the term "nervous exhaustion" was a studied adroit attempt to "sugar-coat" the poisonous pill of syphilis.

But in order to measure the sincerity, or lack of it, shown by defendant's counsel in using that sentence, we must read the next paragraph of his argument.

> "* * * The day following he (Dr. St. Elmo Sanders) had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it too, gentlemen. We know and the evidence of these physicians medical men, show that iodide of potassium was the old remedy for a specific trouble; and right on there was a Wassermann test. That suggested to me that the doctor had made a wrong diagnosis of the case" (420).

Now what does that mean? It means that the defendant claims that the evidence shows that plain-

tiff had syphilis. That is exactly what it means and nothing else. The defendant there charges that the doctor "had a *positive* diagnosis" when he took the Wassermann test, not a negative one, and getting a *positive* was why he administered iodide of potassium. Here is a bold charge that Dr. Sanders' hospital record was false and that the doctor actually found syphilis, else he would not have given her iodide of potassium.

The doctor diagnosed the case as "odema of the brain resulting from injury." The defendant said in substance: "That diagnosis was wrong, she did not have 'odema of the brain resulting from injury'; she had syphilis; and we charge that she had syphilis because the doctor gave her iodide of potassium which the world knows is a treatment for syphilis, and the doctor took a Wassermann test which everybody knows is taken to determine syphilis; the doctor had a *positive* diagnosis, not a negative one, that is why he gave her iodide of potassium to treat the syphilis."

The defendant's counsel was blowing hot and cold; in one breath he says she hasn't a "specific trouble" and in the next breath he says the plaintiff has syphilis, but adroitly avoids the use of that particular word.

It must be remembered that plaintiff was injured on September 27, 1925, and that Dr. Geraughty did not see her until "the early part of March, 1926" (p. 316) and that *plaintiff was a paralytic six months before Dr. Geraughty treated her.* Surely nothing that Dr. Geraughty did could have made her a paralytic before he saw her. The fact is that counsel for defendant's argument about Dr. Geraughty's treatment is an

eleventh hour attempt to avoid or minimize the effect of his ill-considered attempt to charge that plaintiff had neurosyphilis. And the use of the word "neurosyphilis" is another evidence of defendant's cunning. "Neurosyphilis" is syphilis in the second degree, "when it gets down into the nerves." Syphilis is syphilis whether it be in the first, second or third stage and no long Latin word makes the disease any the less terrible, nor does such a word in any manner excuse the defendant from falsely charging a pure woman with having such a loathesome disease.

(c) **The objections and exceptions to the argument of plaintiff's counsel were indefinite and insufficient. The defendant did not object to the argument that the defense was "syphilis," but its objection was limited to any argument that defendant was charging plaintiff with indecency.**

What was the objection taken by defendant to the argument of plaintiff's counsel about syphilis? These objections appear on pages 412 and 427 of the record. In Mr. Chilcott's argument (402) he said:

> "But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.
>
> "Mr. Marley: I object to that, your honor. There is no evidence of that at all. It isn't proper argument.
>
> "*The Court: The objection is overruled, in view of the examination of the witnesses and of the testimony in the case.*"

Now what did Mr. Marley mean when he said "There is no evidence of that at all." Evidence of

what? Did he mean to say that syphilis was not a defense and, hence, the argument was improper, or did he mean to say that there was no evidence that "syphilis would bar that girl from society?" In order to understand just what that objection meant, it is necessary to see what objection Mr. Marley made to Mr. Wickersham's closing argument. On pages 426-427 Mr. Wickersham said:

> "Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—
>
> "**Mr. Marley: If Your Honor please, there is no evidence of that kind, or any attempt on our part—**
>
> "Mr. Wickersham: I say there is.
>
> "**Mr. Marley: —to charge her with indecency, and I take exception to the argument of counsel along those lines.**
>
> "The Court: The gentlemen of the jury will recall what the testimony has been. Counsel may argue the testimony as they recall it and draw inferences from the testimony which they think may be drawn.
>
> . . . . . .
>
> But you must depend upon the testimony of the case for your decision."

Plaintiff's counsel did not say that defendant charged plaintiff with indecency.

It will be noted that Mr. Marley does not say that the defense is not syphilis; nowhere does he disclaim that syphilis is a defense; all that he then claimed was that the defendant was not attempting "to charge her with indecency." And he follows that with the state-

ment "And I take exception to the argument of counsel along those lines," to-wit, along the lines of indecency. Remember that defendant in the cross examination of Dr. Geraughty (p. 330) had brought out the fact that "very frequently ladies may acquire it (syphilis) by drinking out of cups, or kissing people that might have a *chancre* on their lips," that is to say, may acquire syphilis innocently and without immorality or indecency.

There was not a single thing in defendant's objection that apprized the trial court that defendant was not contending, and had not been contending, that the plaintiff had the syphilis.

If the plaintiff had the syphilis, was she "indecent" in any sense of the term? That we will discuss later.

It is fundamental law that an objection to a court's ruling and an objection to the court's charge must be definite and specific to be availing to predicate error.

> "An assignment of error is bad if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented." Zoline's Fed. App. Jurisdiction & Procedure, page 217, Sec. 226.

In *United States* v. *Hammond*, 226 Fed. 849, the court said:

> "In the District Courts, an exception to a charge, in order to entitle a party to have it entertained on motion for new trial, must be sufficiently distinct and specific to direct the attention of the court to the particular vice or error complained of, so that the court may see whether

> the objection is well-founded, and have an opportunity, before the jury retires, to correct any error."

In *Beiseker, et al., v. Moore*, 174 Fed. 368, (Eighth Circuit), Judge Adams said:

> "* * * **It is the duty of counsel to direct the attention of the court to the precise point of objection.**"

In *A. T. & S. F. Ry. Co. v. Nichols*, 2 Fed. (2d) 12, Judge Hunt uses (but does not quote) the following language of Mr. Justice Pitney in *United States v. U. S. F. & G. Co.*, 236 U. S. 696, as follows:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed he has erred in law, so that he may reconsider it, and change his ruling if convinced of error, and that injustice and mistrial due to inadvertent error may thus be obviated. *An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court*" (Citing many cases) (Italics ours).

We submit that the objection and exception taken by the defendant to the above quoted argument was specifically limited to the matter of "decency" when Mr. Marley said: "If, Your Honor, please, there is no evidence of that kind, of any attempt on our part * * * to charge her with indecency and I take exception to the argument of counsel along those lines." The objection was limited to that and that alone. It was not an objection to our argument that the defense was syphilis.

(d) *To falsely charge that a woman has syphilis is libelous or slanderous per se.*

Dunglison's Medical Dictionary says that while the etymology of the word "syphilis" is unknown; that it is very probably derived from the Greek word "*siphlos*" —formed, by a contraction from "*sipalos*"—meaning "*a reproach.*" It is a "chronic, specific, contagious venereal disease."

Odgers, in his work on Libel and Slander (4th Ed.) 1905, page 48, Sec. 2, says:

> "Words imputed to the plaintiff that he has an infectious or contagious disease, are actionable without proof of specific damage. *For the effect of such imputation is naturally to exclude the plaintiff from society.* Such disease may be either leprosy, venereal disease, or it seems the plague * * *. Any words which hearers would naturally understand as conveying the meaning that the plaintiff then has such a disease are sufficient."

Newell on Libel and Slander (3rd Ed.) 1914, page 240, says:

> "Defamatory words falsely spoken, of a person which imputed that the party is infected with some contagious disease, where, if the charge is true, *it would exclude the party from society*, are actionable within themselves without proof of specific damages."

The Court in *Goldeman* v. *Stearns*, 7 Gray (Mass.) 181 says:

> "The charge against a person of his having a venereal disease is held to be actionable * * *, *not because the charge imputes any legal or moral offense, but solely because it tends to exclude him*

*from society as a person having a disgusting and contagious disease * * * and with whom it is unsafe to associate.*"

36 C. J. page 1167 says:

> "The general rule is that to charge one orally with a disease which would *wholly or partially exclude him from society* is actionable *per se*. * * * This principle has been applied to venereal disorders." Citing *King* v. *Pillsbury*, 115 Me. 528; *Simpson* v. *Press Pub. Co.*, 67 N. Y. S. 401; *Watson* v. *McCarthy*, 2 Ga. 57; *McDonald* v. *Nugent*, 122 Iowa 651, and others (all above italics ours).

Syphilis is defined by Webster as "a chronic, specific, contagious venereal disease." It is loathesome—something to be shunned. A woman is not considered "decent" who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law. No court will ever take from such a woman a just judgment because her lawyer exposed such a contemptible defense.

(c) *The control of argument by counsel rests in the sound discretion of the trial court.*

As applied to the simple issue presented in this case, we understand the law to be that counsel in argument to the jury may not:

1. Go outside the record, except he may comment upon pertinent matters of common knowledge.

2. State facts of his own knowledge, and thus testify.

3. Use obscene or improper language.

4. State erroneous propositions of law governing the case.

5. Unduly appeal to local, racial, financial, corporate or religious prejudices.

But counsel may:

1. Discuss any fact in evidence and draw inferences therefrom.

2. Discuss matters of common knowledge that are pertinent to the evidence or issues.

3. Discuss any issue to be submitted under the pleadings and the evidence.

4. In discussing any fact in evidence or any defense raised by the pleadings or the evidence resort to so-called "oratory" or declamation, and vigorously comment upon any defense interposed so long as he keeps within the record and does not use language unbecoming an officer of the court.

The control of argument by counsel rests in the sound discretion of the trial court, because:

The Trial Court

1. Sees and hears the witnesses.

2. Sees and hears counsel, observes their manner, actions, voice, intonation and understands the effect of their efforts.

3. Sees the jury, and knows the class and kind of men composing the jury.

4. During the trial often confers with counsel out of the hearing of the jury and such conferences are often not incorporated in the record.

5. Knows whether assistant attorneys, claim attorneys or claim agents sit at the counsel table and actively aid counsel trying the case, although they may not be listed as attorneys in the case.

6. Sees and observes the effect upon the jury of argument by counsel.

When the defendant offered an objection to the argument of plaintiff's counsel it was defendant counsel's duty to make the objection plain and specific, and thus definitely advise the court as to exactly what was claimed to be objectionable and why.

If the objection is double in that it covers two subjects, one of which is objectionable and the other not, then the objection is bad and unavailing. The objector has only himself to blame under such circumstances.

The defendant's objection to Mr. Chilcott's argument was cryptic or double. Mr. Chilcott said: (a) the defense was syphilis, and (b) syphilis would bar plaintiff from society. The objection was "there is no evidence as to that at all." Did the defendant object because there was no evidence that the defense was syphilis, or did defendant object because there was no evidence that syphilis would bar plaintiff from society?

The court said: "The objection is overruled, in view of the examination of the witnesses, and of the testimony in the case."

That defendant was not objecting to our argument that the defense was "syphilis" but was only objecting to our charge that syphilis would bar her from society, see argument, *supra*, point 4 d.

In the case of *Grand Trunk Ry. Co. v. Blau*, 207 Fed. 635, the plaintiff in error claimed that counsel for

the defendant in error made an improper statement in the presence of the jury concerning an absent witness, to-wit: "That confirms my theory that the Grand Trunk Railway Company have got her." Counsel for plaintiff in error then said: "I desire an exception to that remark." The Circuit Court of Appeals in passing upon this matter said:

> **"Counsel for the plaintiff in error did not ask for an instruction to correct the impropriety of this remark. He did not request that the jury be cautioned to be uninfluenced by it, or that they disregard the remark. To make available the impropriety of this remark as an error at the trial, it was incumbent upon counsel for the plaintiff in error to ask for some instruction to the jury to disregard the remark, or be uninfluenced thereby. A mere exception to the remark was insufficient."**

In the case of *Plunnett* v. *McFall*, 284 S. W. 850, the court said:

> "Suffice it to say, it is largely for the trial court to determine whether counsel, in the conduct of a case and in argument to the jury, transcend the limits of professional duty and propriety, and unless there has been a clear abuse of such discretionary power, it is not within the province of an appellate court to interfere."

The defendant does not contend that the verdicts for plaintiffs are excessive, indeed, such question could not be raised under a writ of error. The fact that the defendant did not make a motion for new trial upon this ground is impelling proof that the verdicts are not excessive even in the opinion of the defendant.

The court in the case of *Brady* v. *Traction Co.*, 140 Mo. App. 421, said in discussing the argument of counsel which they held improper, said:

> "We conclude that the only proper verdict that could have been rendered was a verdict for plaintiff, and that the damages assessed, * * * are not excessive, and we therefore, have reached the conclusion in this case, that the remarks of the counsel for plaintiff, improper as they were, did not effect the result."

In the case of *Remus* v. *U. S.*, 291 Fed. 501, the court said:

> "Though arguments by a district attorney calculated to inflame jurors and prejudice them against accused are not regarded with favor, the district attorney has the right, and it is his duty, so long as he confines his argument to the evidence, to present the government's side of the case in forcible and direct language."

In the case of *Ostertag* v. *Railroad*, 261 Mo. 457, the court said:

> "There was no error in plaintiff's counsel in his argument to the jury calling defendant's claim agent a ghoul, when speaking of his having visited the hospital and obtained a statement from plaintiff two days after the accident in which the plaintiff had lost a leg."
>
> "Permitting counsel to state to the jury, in an action for charging a girl with fornication, that one guilty of making such charge is not fit to live in the county is not reversible error." *Miller* v. *Nuckolls*, 77 Ark. 64, 91 S. W. 759; 4 L. R. A. (N. S.) 149.

In *Morrill* v. *Palmer*, 68 Vt. 1, 33 L. R. A. 411, plaintiff's counsel in his argument to the jury said:

> "The sister, whited sepulcher, caused this trouble."

Defendant claimed there was "no evidence of that fact." The court held it was a legitimate inference plaintiff might draw and said:

> "It would bring the jury system into great disrepute, and be a reproach to our jurisprudence, if we reversed judgments for such remarks of counsel in commenting on testimony" (Judge Taft).

In *Home Benefit Association* v. *Horne*, 290 S. W. 226, plaintiff sued on accident policy for loss of an eye. On *cross examination* of plaintiff defendant brought out that,

> "in 1916 he was examined by a doctor in Fort Worth, and they (defendants) attempted to show by appellee (plaintiff) that said doctor informed him that he was suffering with said disease (syphilis)."

They also on *cross examination* showed:

> "That he had on several different occasions after 1916 been examined by other doctors and attempted to show that each of them had pronounced him suffering with the same disease."

The Appellate Court said:

> "Appellants complain of the following argument of counsel in his closing speech to the jury: 'I feel doubly responsible in this case, not only because of the amount involved that this man is suing for and which he needs, but I feel responsible because he charged this man with having an infamous disease, calculated in most families to cause unhappiness.' • • •

> "The record further shows that the only defense made by appellants to the claim was that appellee had suffered the loss of his eye, by reason of the disease, *and of course the jury knew it was an infamous disease.*"

(f) *After the arguments and before the case was submitted to the jury the Court twice asked the defendant if it desired any additional instructions to the jury and the defendant did not request any instruction on this ground.*

After the arguments and the instructions by the Court, the Court asked if plaintiff desired to except or to request additional instructions and plaintiff's counsel said: "No, sir," and then the Court said:

> "Does the defendant desire to request additional instructions or to except to those given by the Court?" (443).

If the defendant then thought that the defense it was making had been misrepresented by the plaintiff or that its interests had suffered by the argument, or that the jury might be prejudiced by anything that had been said during the argument, here was an invitation by the Court to the defendant to offer any request for an instruction on such subject. If the defendant actually was not defending on the ground of syphilis and it honestly felt aggrieved by plaintiff's argument, and it wanted the jury to know definitely its position as to that matter, and it did not want the jury to have any wrong idea about such defense, and thus have any possible prejudice eliminated, here was an opportunity for the defendant to have asked the Court to instruct the jury accordingly. But no, the defendant did not

do that. The truth is that this matter of argument was a matter of little or no moment in this defendant's mind at that time. The defendant, however, called to the Court's attention a number of matters it considered of importance. It requested the Court to charge the jury concerning the relationship of witnesses to the plaintiff, which the Court promptly did; it excepted to a long instruction about the care required of defendant; then it excepted to the charge as to burden of proof and the Court's modification thereof, and then as to the measure of damages for Edward H. Johnson, the husband, etc., etc., and when the defendant had concluded, the Court again asked defendant: "Had you some other exception?" (454) and counsel merely added that he desired separate exceptions in the two cases. And when this had been done the Court said:

> "Gentlemen, may I conclude by thanking you for your careful attention to the case, and by thanking the attorneys on both sides for the lawyer-like and gentlemanly manner in which the case has been tried."

Can any appellate judge read and know what happened at the trial of this case and come to any conclusion other than that the defendant here is trying to make a mountain out of a mole hill? The fact that the defendant did not, when the argument was objected to, frankly state that syphilis was not one of its defenses, when the Court and plaintiff both believed that it was, and the fact that the defendant wholly failed to request any instruction thereon, ought to weigh heavily with this Court.

Moreover, the fact that defendant did not make any motion for a new trial, but went to the Court of Appeals on a writ of error, under which the amount of the verdict could not be assailed, ought also to weigh heavily with this Court.

(g) *Plaintiff's argument to the jury was not prejudicial to defendant.*

In the case of *I. & G. N. Ry. Co.* v. *Erwin*, 64 Tex. 535, the Court said:

> "The use of improper language or course of argument by adverse counsel, within itself furnishes no sufficient reason for reversing a judgment; and it is only in cases in which the preponderance of the evidence seems to be against the verdict, or in cases in which the verdict seems excessive and there is reason to believe that the verdict may have been affected by such course of conduct, that it then becomes ground for reversal."

Let us assume for the sake of this discussion that plaintiff's argument was in some manner objectionable. With that premise let us see whether it could possibly have had any influence upon the verdict. It is claimed that influence could be exerted either upon the issue of negligence or the amount of the verdict.

As to the issue of negligence, could the argument reasonably be said to have influenced the jury to return a verdict for plaintiff? A brief analysis readily disproves such charge. The plaintiff's evidence as to how the accident occurred was affirmative evidence; the defendant's evidence was purely negative. The plaintiff's evidence as to how the accident happened consisted of the testimony of the plaintiff and her sister-in-law, Imogene Johnson. Judge Symes in his opinion said:

"The plaintiff and her sister-in-law gave a most graphic description of the accident" (469).

Was that graphic description true? If it was true and the jury believed these two women, then the argument in question could not possibly have influenced the jury in determining whether there was negligence, and as to whether the testimony of these two women is true, we need only listen to the closing argument of defendant's counsel, Mr. Marley, to-wit:

"Now, we have here two young ladies. I will say to you I have known Imogene ever since she was a girl. I knew her mother, and a grander woman than her mother never lived, so you see I know the situation of her and I know her desire to tell the truth, and I believe Myrtle's desire was the same" (422).

Moreover, counsel in his argument immediately following the above statement said:

"But all of a sudden there was a check of the car, and it pitched her forward. Now, what was the effect? She had her right hand on this and it pitched her forward. The tendency is just like the cracking of a whip. When it pitched her forward, it would throw her face forward towards the upper berth and then to the side. Now then, it pitched Imogene over, and of course she knew nothing of what happened only that she picked Myrtle up off the floor. Now that is the situation there" (422).

Moreover, counsel for the defendant in his opening statement, page 94, said:

"* * * The plaintiff's wife was undertaking to open her grip to get something out of it when there was a lurch of the train, and as we understand her head was struck against the upper berth."

Here is an unusual situation; the defendant in his opening statement admitted that there was a lurch of the train that threw the plaintiff's head against the upper berth (94); he admitted in his closing argument that he "had known Imogene ever since she was a girl and, I know her desire to tell the truth and I believe Myrtle's desire was the same" (422-418); *counsel for the defendant frankly admitted before the jury that these two women told the truth;* then he again admits that there was "a check of the car and it pitched her forward" (422). Now if these two young women told the truth, and defendant admits that they told the truth, how can it reasonably be said that the jury could possibly have been misled on the issue of negligence? Especially is this true when we consider the evidence offered by the defendant as to the operation of the train.

The first witness called by defendant on this subject was Kates, the negro porter of the Club car, a number of cars ahead of the car in which plaintiff was riding. He merely stated that he did not recall any unusual jerk of the train. He did not testify where he was at the time of the accident.

The next witness was Emmy Mathews, a negro maid, who testified that there wasn't any jerk of the cars that night, although she does not say where she was on the train at the time of the accident; but this negress was thoroughly discredited and impeached because she testified that the morning after the accident she had a conversation with the plaintiff Myrtle Johnson (375) when as a matter of fact, Myrtle's tongue was so paralyzed she could not talk. This negress also testi-

fied that she thought "drinking lemonade might paralyze a person" (376). Her testimony was utterly worthless.

Martin Kane, the train conductor, was the next witness, who testified that he did not remember any unusual jerk or jar, but that the first time he ever knew anything about this accident was when the claim department called his attention to it "a couple of months at least after the accident." His testimony was thoroughly discredited because the conductor of the train, to-wit, Kane, wired ahead for a doctor for the plaintiff the morning after the accident.

The rear brakeman, McCormick, testified that he didn't remember anything about any jerk of the car, nor did he know anything about the accident, even after it occurred. His cross examination on pages 381-82 completely discredited him.

The passenger brakeman, Connors, testified that he didn't remember any unusual jerk of the car, but his testimony was worthless because he admitted that the first time that his attention had been called to the case was when "he was ordered to go to the claim department in Buffalo" (384-5) and he could not remember what year it was he was ordered there; he never even heard about the plaintiff being injured. His testimony amounted to nothing.

Walter Vernon, the Pullman conductor, was not even asked by defendant's counsel if he felt or observed any unusual lurch or movement of the train. This witness was likewise thoroughly discredited because he claimed that he talked with Myrtle Johnson the day following the accident (389) when it was definitely established that her tongue was so paralyzed that she could not talk.

He was also discredited because he testified that the first time any claim agent or lawyer for the Railroad had ever discussed his evidence with him was when he took the stand (396), notwithstanding the fact that he came all the way from New York to Kansas City for that purpose.

The above were the only witnesses for the defendant who were on that train, and one of them said that the plaintiff claimed that she stumbled over a grip, and another one said that the plaintiff claimed that she bumped her head while getting over her sister in the berth, both stories being positively untrue. These two witnesses were discredited by defendant's own counsel who admitted in his closing argument that Myrtle and Imogene both told the truth. In other words, there was no explanation whatever offered to rebut the positive proof of the plaintiff. Moreover, *the defendant failed to put upon the stand the engineer or the fireman* of this particular train and the nurse who attended the plaintiff and *also failed to produce any passenger on that train* notwithstanding the fact that the reservation cards containing the names of all passengers were under the control of the defendant.

We realize that an appellate court might take the position that if an argument on its face was more or less improper that the conclusion might well be formed, that such improper argument had an effect upon the jury in its verdict, but we submit that an examination of the negative testimony of Kates, Mathews, Kane, McCormick, Connors and Vernon, will show that the argument in question could not possibly have caused the jury to

believe all or any one of them as against the positive testimony of Myrtle Johnson and Imogene Johnson whose testimony was vouched for by defendant's counsel as true.

Now as to the amount of the verdict. Did the argument complained of substantially or in any manner effect the size of the verdict? It is true that the verdict was for the full amount demanded and that fact ordinarily would cause an appellate court to scrutinize the matter of argument closely, but such scrutiny will reveal the following:

1. The defendant in its closing argument said:

> "Now they put on 21 witnesses, that is true, but what were those witnesses testifying to? To the condition of this poor woman. They were merely testifying to the condition. You didn't need those witnesses to tell you her condition. You could tell it by looking at her on the stand. You gentlemen have intelligence, you have eyes, and you have understanding and you have the ordinary human experience. Now look at that woman, you can see that her condition is unfortunate, that is true."

2. The defendant did not put upon the stand a single witness to controvert the plaintiff's witnesses as to the terrible plight and condition of the plaintiff.

3. Plaintiff's counsel in the closing argument said:

> "Now, gentlemen, if there was one mistake that the plaintiff's lawyers in this case made, it is that when my partner drew the petition in the case he only asked for Twenty-Five Thousand Dollars; that is the one mistake, if any, that was made in this lawsuit, particularly for this woman. That is

the one mistake and only mistake and I ask you, as men good and true, who understand what life means, who understand what health means above all other attributes of human beings, to give to this woman every single penny that is asked, we ought to have asked for Fifty Thousand Dollars instead of Twenty-Five Thousand Dollars."

4. Look at photographs of the plaintiff, page 97, and 101, taken shortly before the accident. She weighed 160 pounds, (97); in perfect health, "good color, and bright clear eyes, athletic," she was a perfectly normal woman up to the time "of the accident" (340); she had a "rosy" complexion; she had never had treatments by any doctor prior to her injury and she had never been sick in any way, shape or form prior to the injury. She played the piano and saxophone "used to swim and target practice" (231), "played golf and engaged in almost all athletics," "danced and sang" (231); at the time of the trial she was "but a shadow of her former self," "she looks lifeless, pepless" (322), "she talks incoherently, she will talk to you for instance, and break off in the middle of the sentence, and start talking about something else, she drags her right foot like a hemiplegiac, she can't wash dishes, she would drop the dishes" (310); "she can't carry on her business as a hair dresser," etc., etc. Her right side is paralyzed and she is now a confirmed invalid.

When the defendant admitted upon the trial that Myrtle and Imogene told the truth, and frankly stated to the jury that it was wholly unnecessary for the plaintiff to put upon the stand 21 witnesses to prove

"the condition of this poor woman," how in the name of justice can it be said that the small verdict for her of Twenty-Five Thousand Dollars was the result in whole or in part of the argument complained of? Isn't it true that the plaintiff's lawyer who drafted the petition and asked for only Twenty-Five Thousand Dollars made a mistake? Isn't it clear that the reason why the defendant did not make a motion for a new trial and assign as one of the grounds excessive damages is because the defendant knew that the trial judge saw this poor woman and would not grant a new trial on that ground? The defendant ought not to be permitted by indirection under a writ of certiorari to raise an issue as to the amount of damages which it could not do under a writ of error.

Conclusion.

These cases were tried before Judge Merrill E. Otis, one of the ablest Federal judges in the west. As such trial judge he was in a better position to know what the defense was than any appellate judge could possibly be. He held that our argument was proper "in view of the examination of the witnesses and of the testimony in the case." If there is any doubt about the propriety of his ruling that doubt should be resolved in his favor. It is only in cases of clear abuse of discretion that an appellate court will reverse the trial court.

We may be entirely wrong in our surmise, but it seems to us that the writs of certiorari were issued in these cases primarily because the language em-

ployed by Judge Symes is seemingly in conflict with the affirmance of the judgments. But it is evident that the Court of Appeals in upholding the judgments believed that the judgments were for the right parties, and that taking everything into consideration justice required that the judgments be affirmed.

We believe it would be a wholesome precedent for this Court to rule that in cases like these the party complaining of alleged improper argument shall first exhaust his remedies in the trial Court by moving for a new trial, and/or asking for a rehearing in the Court of Appeals before this Court will entertain a petition for a writ of certiorari. Fairness to the trial Court and the Court of Appeals seems to demand such a ruling.

We confidently believe that had the defendant asked the Court of Appeals for a rehearing and called that Court's attention to these matters, that that Court upon reflection would have modified the language employed in its opinion, and hence these cases would not be in this Court.

We respectfully urge that the writs be dismissed and the judgments be affirmed.

Respectfully submitted,

John H. Atwood,
Price Wickersham,
Oscar S. Hill,
Clarence C. Chillcott,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

Nos. 455 and 456.—October Term, 1928.

New York Central Railroad Company, Petitioner,		
455	*vs.*	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Edward H. Johnson.		
New York Central Railroad Company, Petitioner,		
456	*vs.*	
Myrtle J. Johnson.		

[April 8, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent in No. 456 brought suit in the Circuit Court of Jackson County, Missouri, to recover for personal injuries alleged to have been caused by the negligent operation of one of petitioner's trains. The suit in No. 455 was brought in the same court by the husband of respondent in No. 456, to recover for the loss of her services. Both cases were removed to the District Court for Western Missouri, where they were tried together. Judgment there on a verdict for respondents was affirmed by the Court of Appeals for the Eighth Circuit. 27 F. (2d) 699. This Court granted certiorari October 15, 1928, — U. S. —, the order allowing the writ directing that the argument in this Court "be limited to the question whether the alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial."

At the trial, there was evidence that respondent, while a passenger on petitioner's train, was thrown to the floor by a sudden and unusual motion of the train, receiving a blow on her head which caused paralysis of one side of the body, impaired locomotion and other physical disabilities. All material allegations of the complaint were denied, including those specially setting up the cause

and nature of respondent's injuries. In the course of the cross-examination of respondents' witnesses, petitioner's counsel elicited the fact that, following the accident, one of respondent's physicians had administered a treatment usually given for syphilis. He asked other questions tending to show, had favorable answers been received, that she had exhibited symptoms recognized to be those of this disease; that the Wasserman test for syphilis, which had been applied to her by her physician with negative results, was not necessarily conclusive as to its non-existance; that other more reliable tests had not been applied; that the disease might cause the paralysis complained of and the treatment for it produce the other symptoms exhibited by respondent.

The opening statement for petitioner to the jury had contained no suggestion that the alleged condition of respondent was due to syphilis. No evidence to that effect was offered in its behalf, counsel contenting himself with calling witnesses to disprove only the negligence and the occurrence of the accident. In the closing argument petitioner's counsel denied any belief that respondent was afflicted with the disease and disclaimed any purpose to show that her present condition was due to it. He then for the first time suggested, although there was no evidence to support it, that her condition was caused by the administration, by one of her physicians, of a specific for syphilis in consequence of a mistaken diagnosis.

Two counsel for respondents participated in the closing argument. The first, who preceded counsel for petitioner, made the following statements to the jury, to which, at several points, objection was made, overruled and an exception noted:

"But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had syphilis.

. . . . . .

"Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.

. . . . . .

"She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every

time she sees people watching her, and knowing what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most—the worst disease that is known in human history, a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one scintilla of evidence in this case to justify it."

The second counsel for respondents, whose argument followed that of petitioner's counsel and his disclaimer already mentioned, was permitted, over objection and exception, to say to the jury:

"You mean to tell me he[petitioner's counsel] didn't talk to those doctors about it? . . . That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

"Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped . . . Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—"

The Circuit Court of Appeals, in affirming the judgment for respondent, said, p. 702:

"Both counsel for the plaintiff who addressed the jury stated that . . .

"'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.'

"And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We therefore deem it proper to observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties."

Petitioner argues, as the court below stated, that there was no defense in the case that respondent's condition was due to syphilis,

that the quoted remarks of counsel were without foundation in the record and that they were so prejudicial as to deprive petitioner of a fair trial.

From what has been said, it is apparent, as respondents assert, that in a strict sense the court of appeals did not, by the remarks quoted, correctly interpret the record or characterize with accuracy the issue which had been raised under the pleadings by the evidence. The burden was on respondents to prove that the physical condition complained of was caused by injuries received on petitioner's train. It was open to petitioner, if so advised, to seek in good faith to show that respondent's condition was not due to the accident, but was attributable to disease as an independent cause. This was a matter of defense which, under petitioner's general denial, might have been established either by the cross-examination of respondents' witnesses or by the testimony of its own.

Examination of the record discloses that counsel for petitioner took the initiative in attempting to develop, by cross-examination of respondents' witnesses, evidence whose only apparent purpose was to support this defense, and this course was continued by him through a considerable portion of the trial. He first directed the inquiry to the symptoms of respondent which, if they existed, would have indicated that she was suffering from the disease. He first brought out that she had been subjected by her own physicians to the Wasserman test. But whatever motive inspired this course of conduct, it was evident that this line of defense came to nothing. The cross-examination developed little of moment and no witnesses were called by petitioner to support it. At the close of the case it was apparent that the attempted or suggested defense that respondent's condition was due to syphilis was without substance and it was formally abandoned by petitioner's counsel in his address to the jury.

In this condition of the record, the repeated statements of counsel that syphilis was the defense, coupled with the vituperative language which we have quoted and the statements that the petitioner had charged respondent with indecency, made in the face of testimony of respondents' own witness that the disease was frequently transmitted by the use of drinking cups or other innocent means, was not fair comment on the evidence or justified by the record. *Cf. Cherry Creek Nat. Bank* v. *Fidelity & Casualty Co.*,

207 App. Div. (N. Y.) 787; *Grabowsky* v. *Baumgart*, 128 Mich. 267, 272; *Fisher* v. *Weinholzer*, 91 Minn. 22, 25; *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496, 504. Their obvious purpose and effect were improperly to influence the verdict by their appeal to passion and prejudice.

However ill advised, counsel for petitioner was within his rights in following this line of inquiry, and even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it. Want of good judgment or good taste, or even misconduct on the part of either was not an issue in the case for the jury nor could it excuse like conduct on the part of respondents' counsel. See *Tucker* v. *Henniker*, 41 N. H. 317, 322; *Mittleman* v. *Bartikowsky*, 283 Pa. 485, 488; *Mitchum* v. *Georgia*, 11 Ga. 615, 629; *Welch* v. *Union Central Life Ins. Co.*, 117 Iowa 394, 404. An exhibition of any or all of these faults was not ground for a verdict in respondents' favor or for enhancing it.

Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See *Masterson* v. *Chicago & N. W. Ry. Co.*, 102 Wis. 571, 574; *Gulf, Colorado & S. F. Ry. Co.* v. *Butcher*, 83 Tex. 309, 316; *Tucker* v. *Henniker*, *supra*, at 322; *Monroe* v. *Chicago & Alton R. R. Co.*, 297 Mo. 633, 644. The failure of the trial judge to sustain petitioner's objection or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See *Hall* v. *United States*, 150 U. S. 76, 81; *Graves* v. *United States*, 150 U. S. 118, 121; *Wilson* v. *United States*, 149 U. S. 60, 68. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.

Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, "purely a private controversy . . . of no importance to the public." The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that

verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See *Union Pac. Ry. Co.* v. *Field*, 137 Fed. 14, 15; *Brown* v. *Swineford*, 44 Wis. 282, 293. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error. *Brasfield* v. *United States*, 272 U. S. 448, 450.

As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial; their repeated assertion, without supporting evidence, that the defense was a "claim agent defense"; references to petitioner as an "eastern railroad"; and statements that the railroad had "come into this town" and that witnesses and records had been "sent on from New York" for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See *Cherry Creek Nat. Bk.* v. *Fidelity & Casualty Co.*, *supra*, *Dolph* v. *Lake Shore etc. Ry. Co.*, 149 Mich. 278, 280; *Southern Ry. Co.* v. *Simmons*, 105 Va. 651, 665.

These writs of certiorari were granted on a petition signed by counsel for petitioner who argued the cases here. It stated that the cases were of importance and were such a departure "from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision." But his argument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the Court, and in the argument of counsel on both sides there was a want of that candor which is essential to the proper and adequate presentation of a cause in this Court. The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor discredits the bar and obstructs the administration of justice.

Reversed.